MANUAL

OF

JURISPRUDENCE,

FOUNDED ON THE

TRIES OF JOSEPH STORY, LL.D

COMPRISING, IN A SMALL COMPASS,

COLLECTION OF POINTS

CONSTANTLY OCCURRING

IN

Equity and Conveyancing,

AND IN

REAL PRACTICE OF A SOLICITOR.

JOSIAH W. SMITH, B.C.L.

OF LINCOLN'S INN, BARRISTER AT LAW.

LONDON:

S. STEVENS AND G. S. NORTON,

Presented to
The Library
of the
University of Toronto
by
The estate of the late
Mrs. Marie E. Remon

Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

http://www.archive.org/details/manualofequityp00[illegible]

Law
Eng
S633ma.3

A

MANUAL

OF

EQUITY JURISPRUDENCE,

AS

Administered in England,

FOUNDED ON THE

COMMENTARIES OF JOSEPH STORY, LL.D.

ONE OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AND COMPRISING, IN A SMALL COMPASS,

A NUMEROUS COLLECTION OF POINTS

CONSTANTLY OCCURRING

IN

Chancery and Conveyancing,

AND IN

THE GENERAL PRACTICE OF A SOLICITOR.

BY JOSIAH W. SMITH, B.C.L.

OF LINCOLN'S INN, BARRISTER AT LAW,

Editor of Fearne's Contingent Remainders and Executory Devises, and Author of a Treatise on Executory Interests.

377337
18.3.40

LONDON:

V. AND R. STEVENS AND G. S. NORTON,

Law Booksellers and Publishers,

(Successors to the late J. & W. T. CLARKE, of Portugal Street,)

26 AND 39, BELL YARD, LINCOLN'S INN.

HODGES AND SMITH, DUBLIN.

MDCCCXLV.

LONDON:
WILLIAM STEVENS, PRINTER, BELL YARD,
TEMPLE BAR.

PREFACE.

The writer of these pages is under no apprehension that a work answering to the title of the present little book, will be deemed *unnecessary*. On the contrary, he is not aware of the existence of any book purporting to give a succinct yet comprehensive view of the leading principles of Equity Jurisprudence; and, if he may judge at all from his own experience, he believes that the want of a book of that description is greatly felt by students, and indeed by many practitioners, in each branch of the profession. For, the student labours under great disadvantages, when he enters upon the perusal of a large Treatise, without having previously read any smaller work upon the same subject. And even after he has read a work of two volumes, he is able accurately to retain but few points in his

memory—far fewer than he would by a careful perusal of a condensed work, like the present. And the practitioner, instead of being obliged to refer to a Treatise on Equity, often stands in need of a body of points and principles, well fixed in his mind, as his constant guide and aid amidst the rapid occasions of daily practice. And it is impossible for him to become possessed of such a body of knowledge, except by the help of some succinct view of Equity, or by the experience gained during long and extensive practice.

Whether the present attempt to supply such a desideratum is successful, it is for others to decide.

The substance of the Manual was originally written in short-hand five years ago, merely for the writer's own use, and is of a *semi-original character, bearing the same relation to the Commentaries, as the Commentaries bear to the several treatises and reports on which they are founded.* Many of the passages, indeed, are mere extracts; but the selection of such passages as expressed,

in the fewest words, the pith of whole sections, or that view of a subject which seemed to be the more correct, involved considerable deliberation and discrimination. And, taking the Manual as a whole, there has been the same process of analysing, arranging, digesting, defining, distinguishing, deducing, qualifying, and commenting, as in the generality of legal treatises; and the reader will scarcely suppose the amount of close consideration which has been bestowed upon so small a book.

As the learned Judge seems to have availed himself of most of the treatises, as well as of the reports, in the composition of his Commentaries, there appeared to be no necessity, in general, for the writer's consulting other works besides the Commentaries, while engaged upon the Manual, unless he had designed to enter more into detail. At the same time, he has written under the light derived from the previous perusal of other works. And he has noticed several recent enactments, which, as not applicable to America, the learned Judge has omitted.

With regard to the principle of selection, the writer has endeavoured to collect together, under appropriate heads, a numerous collection of points necessary to be accurately known and constantly borne in mind by every Chancery and conveyancing counsel, and by every solicitor, for his guidance and assistance in practice, on occasions when he may have no time or opportunity to refer to any book: and for that purpose, the writer has laboured to extract, and mould into a concise, perspicuous form, the essence of the Commentaries, which comprise upwards of 1,600 pages; omitting such cases as are of a peculiar nature, and not likely to occur again; and also omitting (except where it seemed necessary to use them as examples) such cases as are of so simple and obvious a character, that the decisions respecting them embody nothing more than so plain and necessary an application of points and principles stated in the work, that it would be sure to suggest itself at once, without variation, to the minds of different individuals.

The writer gladly embraces this opportunity of expressing his most grateful acknowledgments to the very eminent and gifted Author of the "Commentaries on Equity Jurisprudence," and on "Equity Pleadings," as well in respect of the present little undertaking, as of the great assistance the writer received, when a student, from both those valuable works. He trusts that no apology need be offered by him to the learned Judge, for the use he has made of the "Commentaries on Equity Jurisprudence," in the following pages. Indeed, he hopes and believes, that so far from injuring those Commentaries, these pages, if they should meet with a favourable reception, will tend to promote the circulation of the former. For, in every instance, he has scrupulously referred to the passages in the Commentaries from which any points have been taken, or from which any hints have been derived, even where those passages have been themselves extracted from other works; and he has not given the references to the authorities cited in the Commentaries, but has simply referred to

the sections of the Commentaries where they are so cited.

A host of English Treatises and cases are cited by the learned Judge and Author, exclusively of the American decisions. The points comprised in the following pages are those in support of which English authorities are cited.

The want of references to the authorities themselves, may seem, at first sight, to be a strong ground of objection, in the eyes of those who do not possess the Commentaries. But, in reality, it is not so. For, to have given those references (if the writer's feelings towards the learned Author of the Commentaries would have allowed him to do so) would have doubled the bulk and price of the Manual: and it is rarely necessary or advisable for the student to consume his time by referring to the authorities; and, with respect to those who are engaged in practice, the earlier editions of the Commentaries contain almost all the sections referred to in these pages, numbered in the same manner, although the last is the edition

from which the Manual was ultimately prepared for the press.

The writer has generally prefixed the word "see" to the references, where he has interspersed original matter, or has modified, in point of substance, the statements he has taken from the Commentaries, with reference to the cases contained in other passages, or otherwise; or where he has deduced, rather than abstracted, the ideas from a passage in the Commentaries; or where he has completely blended together, for the sake of brevity, precision, or otherwise, the ideas contained in two or more passages; or where he has expressed his own views, or has laid down original propositions, but has referred to passages in the Commentaries in support of such views or propositions. As to those paragraphs to which no reference is added, he alone is responsible.

8, *Old Square, Lincoln's Inn.*

ANALYSIS.

INTRODUCTION.

SECTION I.—*Of the Nature of Equity Jurisprudence, and the Extent of Equity Jurisdiction.*

Difficulty and importance of the inquiry.—Definition of Equity Jurisprudence, p. 1-3.

I. Equity Jurisprudence is not synonymous with natural justice.—A large portion of natural justice is left to conscience.—Another large portion is administered, in a modified form, in Courts of Law.—That which is administered in Courts of Equity is therefore only a portion of natural justice, and in a modified form, p. 3-5.

II. 1. Where rights are not enforced at Law, but are in Equity, so that Equity has exclusive jurisdiction over them, p. 6.

2. Where Equity has concurrent jurisdiction, on account of the inadequacy of the legal relief;—or to avoid circuity of action, or multiplicity of suits;—or to take due care of the rights of all;—or on account of the original denial of due relief at Law;—or the doubtfulness of obtaining such relief, p. 6—8.

3. Where Equity has auxiliary jurisdiction, p. 8.

4. Where it has no jurisdiction, p. 9.

Equity is a suppletory system.—Advantages of the Common Law procedure—Disadvantages of the Equity procedure.—Consequent propriety of Equity Jurisdiction being circumscribed within its present limits.—Defectiveness of the Common Law procedure

and merits of the Equity procedure, and consequent propriety of Equity possessing its present Jurisdiction.—Connexion of these considerations with the subject.—Concluding remarks on the amalgamation or union of Law and Equity, p. 9-15.

SECTION II.—*Of the General Maxims of Equity Jurisprudence.*

I. No Right without a remedy.—Importance of the maxim.—Qualification of its generality, p. 16-17.

II. Equity will administer a due remedy, where it cannot or could not be had at Law, p. 17.

III. But Equity will not interfere where the Courts of Law could administer a due remedy.—Illustration drawn from the case of rents, p. 17.

IV. Equity follows the Law.—True meaning of the maxim.—Illustration of the maxim in regard to trusts executed.—Maxim does not apply to trusts executory in all respects.—Illustrations of the qualification added in the writer's statement of the true meaning of the maxim.—Law of primogeniture.—Powers.—Statute of Limitations, p. 18-24.

V. *Vigilantibus, non dormientibus, æquitas subvenit*, p. 24.

VI. Where there is equal Equity, the Law must prevail, p. 24.

VII. Equality is Equity.—Illustration drawn from the case of a joint purchase or mortgage, p. 25.

VIII. He who comes into Equity must come with clean hands.—Illustration drawn from a fraudulent fransaction.—Qualification of the maxim, p. 26.

IX. He who seeks Equity must do Equity.—Illustration drawn from an usurious transaction, p. 27.

X. Equity looks on that as done, which ought to have been done, p. 27.

XI. Equity will act *in personam*, in respect of property out of the Jurisdiction.—A partition cannot be made of such property.—But an account may be had.—And a foreign judgment may be indirectly overhauled, p. 28.

SECTION III.—*Of the Division of Equity.*

TITLE I.

Of Remedial Equity,

SPECIFICALLY SO TERMED.

CHAPTER I.

OF ACCIDENT.

Definition of Accident in the usual sense of the word.—Definition of Accident, in the technical sense.—Illustration in the case of a reduction of stock, p. 33.

I. Accidents remediable at Law, p. 33.

II. Accidents not remediable at Law or in Equity; as in cases of the culpability of the sufferer;—or of an absolute agreement, to repair, or to pay rent;—or of countervailing Equity, or want of Equity; as where a will is defectively executed, p. 33-35.

III. Accidents remediable in Equity.—I. Relief in case of inability to establish a right.—(1.) Jurisdiction for discovery in cases of destroyed, lost, or suppressed deeds, and jurisdiction for relief in such cases.—Requisites to maintain the jurisdiction for relief in such cases.—Instances in which Equity has jurisdiction for relief in those cases.—(2.) Jurisdiction in cases of lost unsealed securities.—2. Relief in cases of the defective execution or non-execution of powers, p. 35-40.

CHAPTER II.

OF MISTAKE.

Definition of Mistake, p. 41.

I. Mistake made by the sufferer alone, in a matter of Law, or in a matter of fact, p. 41-42.

II. Mutual Mistake, p. 42.

III. Compromise of doubtful rights, p. 42.

IV. Correction of a Mistake in a written instrument, or in regard thereto, where the Mistake is admitted or proved, p. 43.

V. Correction of a presumable Mistake in a written instrument. —p. 44.

VI. Avoidance of a written instrument on the ground of Mistake, p. 45.

VII. Mistake in the execution of powers, p. 45.

VIII. Mistaken bequest or revocation, p. 45.

CHAPTER III.

OF ACTUAL FRAUD.

Unsafe to define Fraud *in general*, or the extent of remedial Equity on the Ground of Fraud.—Definition of Actual Fraud.—Jurisdiction in cases of Fraud.—Evidence of Fraud.—Division of Actual Frauds, p. 47-50.

I. First class of Actual Frauds.—1. Misrepresentation.—2. Concealment.—3. Inadequacy.—4. Refusal of consent to a marriage. —5. Awards, p. 51-56.

II. Second class of Actual Frauds.—1. On persons of unsound mind.—2. On intoxicated persons.—3. On persons of weak understanding.—4. On persons who are not free agents, but under duress, or in fear, or imprisonment, or extreme necessity.— 5. On infants, p. 56-59.

CHAPTER IV.

OF CONSTRUCTIVE FRAUD.

Definition.—Four classes of Constructive Frauds, p. 60.

I. Frauds on public policy.—1. Marriage brokage contracts.— 2. Agreements to influence testators.—3. Contracts to facilitate Marriages.—4. Contracts or conditions in restraint of marriage. —5. Contracts or conditions in restraint of trade.—6. Contracts for public offices.—7. Suppression of criminal proceedings.— 8. Champerty and corrupt considerations, p. 60-63.

II. Frauds in the case of persons in the confidential relations of—1. Parent.—2. Guardian.—3. Quasi guardian or adviser.

—4. Attorney.—5. Doctor.—6. Agent.—7. Trustee.—8. Assignees and solicitors of a bankrupt or insolvent.—9. Executor or administrator.—10. Debtor, creditor, and surety, p. 63-67.

III. Frauds in case of persons peculiarly liable to be imposed on.—1. Bargains with expectant heirs, and remainder-men and reversioners.—2. Post-obit bonds, &c. by expectants.—3. Sales to expectants at exorbitant prices.—4. Common sailors, p. 67-70.

IV. Virtual Frauds on individuals, irrespective of any confidential relation, or any peculiar liability to imposition.—1. Misleading.—2. Frauds on auctions.—3. Unconscientious use of the Statute of Frauds.—4. Clandestine marriage contracts.—5. Frauds on marriages.—6. Frauds on marital rights or expectations.—7. Frauds under the Statute 13 Eliz. c. 5.—8. Frauds on creditors, parties to a composition deed —9. Mortgage or conveyance with notice of another's title.—10. Fraudulent dealing with executors or administrators.—11. Frauds under the Statute 27 Eliz. c. 4, p. 70-79.

TITLE II.

Of Executive Equity.

CHAPTER I.

OF LEGACIES.

Jurisdiction.—Legacy to a married woman.—Legacy to an infant.—Legacy payable at a future day.—Specific Legacy to one for life, remainder to another.—Construction of Legacies, p. 83-87.

CHAPTER II.

OF DONATIONES MORTIS CAUSA.

Jurisdiction.—Definition.—Such Donations sometimes enforced as Trusts.—Mixed character of such Donations, p. 88, 89.

CHAPTER III.

OF EXPRESS PRIVATE TRUSTS EVIDENCED BY SOME WRITTEN DOCUMENT.

I. Definition of a Trust, p. 90.

II. Extent of jurisdiction over Trusts, p. 90.

III. Division of Trusts, p. 90.

IV. Definition of an Express Trust, p. 91.

V. Mode of declaration required by the Statute of Frauds, p. 91.

VI. By what words a Trust may be created, p. 91-93.

VII. Where a Trust fails, because the objects are too indefinite, p. 93.

VIII. Division of Express Trusts.—Definition of a Trust executed.—Definition of a Trust executory, p. 93.

IX. Trusts governed by same rules as legal estates.—Exceptions, p. 93.

X. Trusts of terms, p. 94-97.

XI. Trust created without *cestui que trust's* knowledge, p. 97.

XII. What Trusts will be enforced, p. 97.

XIII. Execution of marriage articles, p. 97.

XIV. Assignments for benefit of creditors, p. 98.

XV. Revocableness of a consignment or remittance, p. 99.

XVI. Obligation of purchaser to see to the application of the purchase money.—General rules.—Specific points in illustration of the same, p. 99-103.

CHAPTER IV.

OF EXPRESS CHARITABLE TRUSTS.

I. Jurisdiction, p. 105.

II. General rules as to definiteness of the objects.—Illustrations, p. 105, 106.

III. Charities favoured—in regard to the want of proper trustees;—in regard to defects;—in regard to the objects;—

in regard to increase of revenue;—in regard to lapse of time, p. 107-109.

IV. Charities abroad, p. 109.

V. Reward to informers, p. 109.

CHAPTER V.

OF IMPLIED TRUSTS.

Definition of Implied Trusts, p. 111.

I. Where Trusts fail, or the property is unexhausted by the Trust, p. 111.

II. Conveyance without consideration, and without use or Trust, p. 111.

III. Limitation of a particular interest only, p. 112.

IV. Undisposed of residue of testator's personal estate, p. 112.

V. Devise in Trust to pay debts and charges.—Devise charged with or subject to debts and charges, p. 113.

VI. Conveyance or assignment or securities in another's name.—Proof of the payment of the purchase money by the real purchaser.—Where resulting Trust is rebutted; as where a purchase or security is taken in the name of a wife or child, p. 113—115.

VII. Limitations which would create a joint-tenancy at Law.—Joint mortgage.—Joint purchase, p. 115.

VIII. Covenant to purchase lands, p. 116.

IX. Covenant to settle lands, p. 116.

CHAPTER VI.

OF CONSTRUCTIVE TRUSTS.

Implied and Constructive Trusts often confounded, p. 117.

Definition of a Constructive Trust, p. 117.

I. Repairs or improvements, p. 117.

II. Payment of legatees or distributees before creditors, p. 118.

III. Covenant or agreement to convey, transfer, or pay money

or other property.—Nature of, and reasons for, the vendor's lien.—Where it originally exists.—Continuance thereof.—Against whom it exists, p. 118—120.

IV. Property acquired or profits made by persons in a fiduciary relation, p. 122.

V. Wrongful conversion of property, p. 123.

VI. Where a trustee sells trust property, and then purchases it, or becomes entitled to it again, p. 124.

CHAPTER VII.

OF TRUSTEES AND OTHERS STANDING IN A FIDUCIARY RELATION.

I. Equity never wants a Trustee, p. 125.

II. Trustees, &c., are not entitled to remuneration, p. 125.

III. What care and diligence they are bound to use.—*Primâ facie* view of the decisions on the subject.—True state of the case.—Omission to sell.—Improper investment.—Omission of one Trustee or Executor to see that the property is duly secured or applied.—Losses without want of customary care or diligence, p. 125-129.

IV. Equity guards against a breach of trust.—Trustee may not mix the Trust-money with his own, p. 129.

V. Trustee is accountable for interest and gains, p. 130.

VI. Responsibility for each other's acts and defaults.—Distinction between Trustees and Executors in regard to the effect of joining in receipts, p. 131.

VII. Joint breach of trust, p. 133.

VIII. Trustees to support contingent remainders, p. 136.

IX. Acquiescence in a breach of trust, p. 137.

X. Debt by breach of trust is a simple contract debt, p. 138.

XI. Power of Trustee to bind the estate by a sale, &c.—Sales or pledges by an Executor, p. 138.

XII. Equity will aid and direct Trustees, p. 139.

XIII. Equity will remove Trustees, and appoint others, p. 139.

XIV. Enactments of 1 Will. IV. c. 60, p. 140,

CHAPTER VIII.

OF THE SPECIFIC PERFORMANCE OF AGREEMENTS AND DUTIES NOT ARISING FROM TRUSTS.

I. Remedy at Law, p. 141.

II. A Specific Performance will be decreed in Equity, where damages would not afford compensation, p. 141.

III. A Specific Performance will not be decreed, where damages would afford complete compensation, p. 142.

IV. At Law, contracts and covenants are considered merely personal and executory; but in Equity, as performed, in regard to consequences.—Land articled or devised to be sold, and money articled or bequeathed to be invested in land, p. 143.

V. Specific Performance decreed between persons claiming under the parties.—Purchaser's heir may require the money to be paid out of the personal estate, p. 144.

VI. Non-compliance with the terms of the Agreement in non-essential particulars, or slight misdescription, p. 144, 145.

VII. Want of title, or substantial misdescription, or want of reasonable compliance with Agreement, p. 145.

VIII. Accidental incapacity of performing the remainder of an Agreement, p. 145.

IX. Performance *sub modo*, p. 146.

X. Agreement not enforced where the parties were incompetent to contract, p. 146.

XI. Nor where the terms are not certain and definite, p. 146.

XII. Nor, in general, in the absence of a valuable consideration, p. 146.

XIII. Nor when it would be morally wrong or inequitable, p. 147.

XIV. Nor will Equity enforce assignments, contracts, or covenants against public policy; as in the case of—1. Assignments by officers of the government.—2. And those involving champerty, maintenance, or buying of pretended titles.—3. Nor assignments of mere naked rights to litigate, 148-150.

XV. Common Law rule against assignments of possibilities or things in action, is not adopted in Equity.—What amounts to

an assignment.—Important to give notice of assignment, p. 152-154.

XVI. Parol contract enforced.—1. When set forth by plaintiff, and admitted.—2. Where the reducing it to writing was prevented by fraud.—3. Where partly performed.—What is deemed a part performance, p. 154, 155.

XVII. Parol variations or additions, p. 156.

XVIII. Parol promise enforced, p. 157.

XIX. Negative Agreements, p. 158.

TITLE III.

Of Adjustive Equity.

CHAPTER I.

OF ACCOUNT IN GENERAL.

Remedies at Law.—Jurisdiction of Equity, p. 161.

Division of Accounts, p. 162.

Open Accounts, p. 162.

Stated Accounts.—A stated Account is ordinarily a bar to relief.—When it is not.—Different modes of relief.—Meaning of "surcharge and falsify."—*Onus probandi.*—Extent of the liberty to surcharge and falsify, p. 162, 163.

Settled Accounts, p. 163.

Lapse of time, p. 164.

Running Accounts, p. 164.

CHAPTER II.

OF ADMINISTRATION.

I. Jurisdiction, p. 166.

II. Bill by executor or administrator, p. 166.

III. Bill by a single creditor.—Bill by one or more creditors, on behalf of themselves and others, p. 167.

IV. Division of Assets.—Definition of legal assets.—Definition of equitable assets, p. 168.

V. Administration of legal assets.—Priority of antecedent liens, claims, and charges.—Administration of equitable assets.—Abatement of debts and legacies, p. 168, 169.

VI. Order of Administration of different properties.—Personal estate primarily applied, except—(1.) in the case of express words or plain intention to the contrary.—(2.) In case the personalty is specifically bequeathed.—(3.) Where the debt or charge is real.—(4.) Where the debt was not contracted by the person who died last seised or entitled, p. 170, 171.

VII. Order of satisfaction, p. 172.

VIII. Marshalling of assets defined and particularly described.—Marshalling in favour of creditors of an inferior rank, or of legatees, or of the heir, or of a devisee.—Legatees put in the place of specialty creditors or a mortgagee, but not of a devisee of real estate not mortgaged.—Legatees put in the place of simple contract creditors.—Marshalling as between legacies charged on land and others not so charged.—Redemption or exoneration of a specific legacy.—Protection of a widow's paraphernalia, p. 173-177.

IX. Assets collected in a foreign country by a domestic executor or administrator.—Assets received by a foreign executor or administrator, and remitted here.—By what Law Administration of such assets is regulated, p. 177-8.

CHAPTER III.

OF MORTGAGES AND PLEDGES.

SECTION I.—*Of Mortgages of Real Property.*

I. What amounts to a Mortgage, p. 179.

II. Mortgagee's estate and rights, and liability to re-convey and account, p. 179, 180.

III. Mortgagor's estate and rights, p. 180.

IV. Tacking, p. 181-184.

V. Who may redeem, p. 184.

VI. Foreclosure, and not a sale, will be decreed, where there is no power of sale, except in certain cases, p. 184.

VII. Equitable Mortgages, p. 186.

SECTION II.—*Of Mortgages and Pledges of Personal Property.*

I. A Mortgage and a Pledge distinguished from each other, p. 187.

II. Tacking, p. 187.

III. Mortgagor's right to redeem, and Mortgagee's right to sell, p. 188.

IV. Pledgor's right of redemption, p. 188.

VI. Pledgee's right of sale, p. 189.

CHAPTER IV.

OF APPORTIONMENT AND CONTRIBUTION.

I. Jurisdiction, p. 190.

II. Two classes of Apportionments.—Illustrations of the first, —Illustrations of Apportionments of the second class, p. 190. 191.

III. Voluntary discharge of an incumbrance by a tenant in tail in possession;—by a tenant in tail in remainder;—by a tenant for life, p. 191-192.

IV. Compulsory discharge of incumbrances, p. 192.

V. Keeping down the interest on incumbrances, p. 193.

VI. Contribution between sureties. — Jurisdiction. —Where such Contribution is enforced.—What is the quantum, p. 194-5.

VII. General average, p. 195.

CHAPTER V.

OF PARTNERSHIP.

I. Jurisdiction, p. 197.

II. Specific performance of an agreement to enter into Partnership.—Carrying into effect the articles of Partnership, where Partnership has commenced, p. 198.

III. Account, and manager or receiver, p. 199.
IV. Dissolution decreed, p. 199.
V. Dissolution prohibited, p. 199.
VI. Injury to the Partnership prevented, p. 199.
VII. Real estate belonging to the Partnership, p. 200.
VIII. Priority as between joint and separate creditors, p. 200.
IX. Creditors may proceed against a deceased partner's estate in the first instance, p. 201.
Similar rule applies to other joint debtors, p. 201.

CHAPTER VI.

OF CERTAIN SPECIAL ADJUSTMENTS IN CASES OF DEBTOR AND CREDITOR.

SECTION I.—*Of the Marshalling of Securities.*

General Doctrine.—No Marshalling where one of two joint Debtors is also a several Debtor of another Creditor, p. 202, 203.

SECTION II.—*Of the Mutual Right to the Benefit of Securities between a Creditor and Sureties*, p. 203-205.

SECTION III.—*Of Set-Off.*

Jurisdiction.—Application of the doctrine is limited.—Connected accounts.—Independent debts.—Where one debt is joint, and the other separate.—Debts accruing in different rights, p. 205, 206.

CHAPTER VII.

OF CERTAIN MISCELLANEOUS CASES OF ACCOUNT.

I. Agency.—II. Mesne profits.—III. Waste.—IV. Tithes and moduses, p. 207, 208.

CHAPTER VIII.

OF DAMAGES AND COMPENSATION.

I. General rule as to Damages or Compensation to a plaintiff. —How assessed, p. 209.

II. Compensation to a defendant, p. 209.

III. Jurisdiction to relieve against penalties and forfeitures.—Where such relief is afforded.—Amount of Compensation in such cases.—Such relief is justly granted, p. 210, 211.

IV. No relief against liquidated damages, where they are really such, p. 211.

V. Where relief is granted as to a breach of covenant, p. 212.

VI. Relief not granted against statutory penalties or forfeitures, p. 212.

VII. A penalty or forfeiture is never enforced in Equity, p. 213.

CHAPTER IX.

OF ELECTION.

Definition, p. 214.

Principle of the doctrine, p. 214.

Where Election arises at Law, p. 214.

Where Election arises in Equity, p. 215.

Election as to one benefit, p. 218.

Election need not be made in ignorance of circumstances, p. 218.

Election may be presumed, p. 218.

No Election in the case of creditors, p. 218.

CHAPTER X.

OF SATISFACTION.

Definition, p. 220.

Where Satisfaction arises, p. 220.

Satisfaction resting on presumption may be rebutted, p. 220.

I. As to portions secured by settlement, p. 220.

II. As to portions left by will to a child.—No ademption of legacies to strangers.—Grounds of the distinction, p. 221-223.

III. As to legacies to creditors, p. 224.

Legacies to debtors, 225.

CHAPTER XI.

OF PARTITION; OF SETTLEMENT OF BOUNDARIES; AND OF ASSIGNMENT OF DOWER.

SECTION I.—*Of Partition.*

Jurisdiction.—Mode of Partition.—Title must be shown.—Partition by or against tenants who have limited interests.—Equitable adjustments, p. 227-229.

SECTION II.—*Of the Settlement of Boundaries.*

General rule.—Confusion through fraud.—Confusion through fault of a party whose duty it was to preserve the Boundaries.—Multiplicity of suits, p. 230, 231.

SECTION III.—*Of the Assignment of Dower*, p. 231.

TITLE IV.

Of Protective Equity,

IRRESPECTIVE OF DISABILITY.

CHAPTER I.

OF PROTECTION FROM LITIGATION OR INJURY, AFFORDED BY THE CANCELLING, DELIVERING UP, AND SECURING OF DOCUMENTS.

Voidable instruments, and those which have answered their purpose, p. 235.

Void instruments, p. 235.

Where an instrument is voidable on account of fraud.—Remarks illustrative of the rule.—Usurious contracts.—Gaming securities.—Forged instruments, p. 235-237.

Delivery up of unexceptionable instruments to the party entitled to them, p. 237.

Inspection and copies of deeds, p. 238.

Securing of Documents, p. 238.

Delivery up of securities, p. 239.

CHAPTER II.

OF PROTECTION FROM LITIGATION RESPECTING THE PROPERTY OF ANOTHER, BY MEANS OF INTERPLEADER.

Common Law process.—Definition of a bill of Interpleader.—Illustrations.—Connexion between the titles of the two claimants.—Principal and agent, p. 240-243.

CHAPTER III.

OF PROTECTION FROM REPEATED OR RENEWED LITIGATION, OR FROM UNJUST LEGAL PROCEEDINGS, AFFORDED BY DECREES UPON BILLS OF PEACE OR BILLS TO ESTABLISH WILLS, AND BY INJUNCTIONS.

SECTION I.—*Of Bills of Peace.*

Definition of a Bill of Peace.—Ground of interference.—Instance of the first class of Bills of Peace.—Pre-requisites to a Bill of Peace.—Rights in contravention of public rights not protected in this way, p. 244-246.

SECTION II.—*Of Bills to establish Wills.*

Jurisdiction in general belongs to the Ecclesiastical Courts, or Courts of Common Law.—Exceptions in the case of consent, and in cases where the question of validity is only preliminary to the giving of equitable relief.—How Equity exercises jurisdiction.—Removal of impediments to a trial at Law, p. 246-7.

SECTION III.—*Of Injunctions to restrain Proceedings at Law.*

Definition of an Injunction.—Common Injunctions.—Special Injunctions, p. 248.

Injunctions granted at any stage of the legal suit, and on a variety of occasions.—Bills for an Injunction after judgment. p. 249.

Injunction not granted against any proceedings not strictly of a civil nature;—nor even against civil proceedings in all cases, p. 250.

Injunction is addressed to the parties, not to the Court, p. 251.

Injunction against a suit in a foreign country, p. 251.

CHAPTER IV.

OF PROTECTION FROM LOSS OR INJURY, IN OTHER CASES, BY INJUNCTION.

Origin of the jurisdiction, p. 252.

Injunctions are either temporary or perpetual; total, or partial; qualified, or unconditional; preventative, or restorative, p. 252.

Injunctions must be prayed for, p. 252.

Equity will not limit its power of granting Injunctions.—General rule as to cases where they *will* be granted, p. 253.

Some specific instances pointed out; namely, of Injunctions in cases of—

I. Waste, permissive or voluntary.—Equitable waste.—Waste in the case of tenants in common, coparceners, and joint-tenants, p. 253, 254.

II. Public nuisances.—Private nuisances, p. 255.

III. Patents, p. 255.

IV. Copyrights, p. 256.

V. Letters, p. 258.

CHAPTER V.

OF PROTECTION FROM ANOTHER'S ABSCONDMENT, BY THE WRIT OF NE EXEAT REGNO; AND PROTECTION BY THE WRIT OF SUPPLICAVIT.

I. Writ of *Ne Exeat Regno*.—Original and present uses thereof, p. 260.

II. Writ of Supplicavit, p. 261.

CHAPTER VI.

OF THE PROTECTION OF PROPERTY, BY TAKING AWAY THE POSSESSION OR RECEIPT THEREOF, OR BY REQUIRING SECURITY.

I. Appointment of a receiver.—Nature of his office and possession.—His power, p. 262, 263.

II. Payment into Court, or to the party entitled, or security, p. 263.

III. Delivery of chattels, p. 263.

TITLE V.

Of Protective Equity,

IN FAVOUR OF PERSONS UNDER DISABILITY.

CHAPTER I.

OF INFANTS.

Jurisdiction.—Appointment of guardians.—Removal of guardians.—Control over them.—Assistance of guardians, p. 267, 268.

Removal of children from their parents, p. 268.

Conversion of the Infant's property, p. 269.

Who are wards of Chancery.—All acts affecting them must be done under the direction of the Court.—Maintenance.—Marriage of a ward of the Court, without its consent.—Recognisance that a ward of Court shall not marry.—Interdiction of intended marriage of a ward of Court, and of addresses.—Settlement on a ward of Court, 270-273.

Statutes 1 Will. IV. c. 60, 65, p. 274.

CHAPTER II.

OF PERSONS OF UNSOUND MIND.

Jurisdiction.—Transactions with Persons of Unsound Mind.—Stat. 1 Will. IV. c. 60, 65, p. 275-277.

CHAPTER III.

OF MARRIED WOMEN.

Common Law doctrine, p. 278.

Division of the subject of the doctrines of Equity as to Married Women, p. 278.

SECTION I.—*The Powers which Husband and Wife have, in Equity, of Contracting with, and Giving and Granting to, each other.*

I. Contracts before marriage, p. 278.

II. Contracts after Marriage, p. 279.

III. Gifts and grants after Marriage, p. 279.

SECTION II.—*Pin-Money and Paraphernalia.*

I. Pin-Money.—Definition thereof.—Arrears thereof, p. 280.

II. Paraphernalia.—Definition thereof.—Rule of Law respecting them.—Rule of Equity, where they were given by the husband; and where given by any one else, p. 281.

SECTION III.—*The Wife's separate Estate.*

I. Means of acquiring it.—1. By gift, grant, devise, or settlement.—2. By carrying on a separate trade in London; or even

elsewhere, by agreement, though the agreement be merely implied, p. 282-284.

II. Wife's power of disposing of separate Estate, where it has arisen from a pre-nuptial agreement.—Where it has arisen from a post-nuptial agreement of the husband.—Where it is given by a third person during the coverture.—Restrictions against alienation or anticipation.—Gifts to the husband by the wife.—Husband's receipt of the income, p. 285-287.

III. Wife's liability, p. 287.

SECTION IV.—*The Wife's Equity to a Settlement or Maintenance out of her own Property.*

I. Equity of the wife, when defendant, against her husband.—General rule.—Injunction against proceedings in other Courts.—Refusal of the husband to make a settlement, p. 289, 290.

II. Equity of the wife, when defendant, as against her husband's assignees or vendees.—General rules.—When an immediate provision is required.—Where the whole fund is required to be settled.—Refusal of the assignees to make a settlement.—Terms for years.—Reversionary *choses in action*, and reversionary equitable interests in personal chattels, p. 290-294.

III. Equity of the wife, when plaintiff, to a settlement, on her husband's death, bankruptcy, or insolvency, and to a maintenance in case of the husband's misconduct, p. 295.

IV. Wife's Equity waived, or lost, or suspended.—Waiver of provision for the children, p. 296-7.

SECTION V.—*Some Points respecting Deeds of Separation*, p. 298.

TITLE VI.

Of Auxiliary Equity.

CHAPTER I.

OF A DISCOVERY IN AID OF A SUIT OR DEFENCE IN ANOTHER COURT.

Definition of a bill of Discovery.—Cases where the necessity for a Discovery forms the sole ground of jurisdiction.—Discovery in aid of a foreign suit, or a suit not yet commenced.—Bills of Discovery are favoured, but may be resisted on certain grounds, p. 303, 304.

CHAPTER II.

OF THE TAKING AND PRESERVING OF TESTIMONY IN AID OF A SUIT OR DEFENCE IN ANOTHER COURT.

Definition of a bill to perpetuate Testimony.—Illustrations, p. 308.

Definition of a bill to take Testimony *de bene esse*.—Illustrations, p. 309.

When a bill to take and preserve Testimony will not be entertained, p. 309.

When depositions taken on such bills are not allowed to be used, p. 310.

A

MANUAL

OF

EQUITY JURISPRUDENCE.

INTRODUCTION.

Section I.

Of the Nature of Equity Jurisprudence, and the Extent of Equity Jurisdiction.

Difficulty and importance of the inquiry.

To explain the true nature of Equity Jurisprudence with brevity, perspicuity, and accurate precision, whether by formal definition, or by succinct observations, is a task of great difficulty (see Story's Com. Ch. I. *passim*,) on account of the mixed character of the science, and the immense extent of learning which, for this purpose, it is necessary for the mind to survey at one and the same time. It is most important, however, that some attempt be made to accomplish this, before the

INTROD. SEC. I.

reader's attention is directed to the particular doctrines of the vast and admirable system, the principal features of which, it is the design of these pages to delineate.

Definition of equity jurisprudence.

Equity Jurisprudence, in the technical, specific, and conventional sense of the term, as contradistinguished from natural, abstract, and universal Equity, and from Law and the statutory jurisprudence of the Court of Chancery, may be defined or described to be, a portion of justice or natural Equity, not embodied in legislative enactments or in the rules of the Common Law, yet modified by a due regard thereto, and to the complex relations and convenience of an artificial state of society, and administered in regard to cases where the particular rights in respect whereof relief is sought, come within some general class of rights enforced at Law, or may be enforced without detriment or inconvenience to the community; but where, as to such particular rights, the Courts of Law cannot, or originally did not, clearly afford any relief, or adequate relief, at least not without circuity of action or multiplicity of suits, or cannot direct such restrictions, adjustments, compensations, qualifications, or conditions, as may be necessary in order to

take due care of the rights of all who are interested in the property in litigation. Although there may possibly be some peculiar cases which may at first be thought to prove this definition or description to be faulty, yet it will probably appear, on closer consideration, that such cases (if any such there are) are not to be regarded as illustrative of the general character of Equity Jurisprudence; and it will probably be found, and the following observations may tend to show, that the above definition or description conveys a just notion of the true nature of that moral science.

Equity jurisprudence is not synonymous with natural justice.

I. In the most general sense, Equity is synonymous with natural justice. (See § 1, 2.) But Equity as contradistinguished from Law, and as administered in our Courts of Equity, has a much narrower and an otherwise different signification. Many matters of natural justice, by the Equity Jurisprudence of this and every other civilised nation, are left to be disposed of *in foro conscientiæ*, from the difficulty of framing any general rules to meet them, and from the mischief and inconvenience which would arise from attempting judicially to enforce such duties as charity, gratitude, and kindness, or even

INTROD. SEC. I.

positive engagements, where they are not founded on a valuable consideration, or, at least, on what is deemed a good consideration. (See § 2, and § 8, note.)

And, on the other hand, setting aside the body of natural justice which is comprised in statutory provisions, a vast proportion of what is specifically denominated Law, as contradistinguished from what is technically designated Equity, has been reared up independently of legislative enactments or arbitrary or conventional rules; and consists, in the main, of a system of natural Equity or justice, modified so as to be adapted to the manifold and complicated relations and exigences of a highly artificial state of society. (See § 7, § 8, notes, and § 20, 34.) And as to the construction of statutes, a Court of Law is bound to interpret them according to the intention of the legislature, as much as a Court of Equity: indeed, both adopt the same principles of interpretation. (See § 15.)

So that, on the one hand, natural justice or Equity is not excluded from a Court of Law, nor, on the other hand, is it carried out to an unlimited extent even in a Court of Equity. And in the cases to which it is applied in a Court of Equity, it is not always

applied in an unmodified form, but is qualified (as we shall see in the next Section and in subsequent pages) by a due regard to legislative enactments and the rules of the Common Law, and to the varied and complicated relations and the general convenience of the subsisting order of things.

A large portion of natural justice is left to conscience.

The truth, then, appears to be this: first, that a large portion of natural Equity is left to be administered *in foro conscientiæ*; because, in addition to the difficulty of propounding precise rules applicable to all cases, a greater detriment and inconvenience to the community would probably ensue from attempting to enforce it in the public Courts, than from leaving it to the decision and the power of conscience, and to the various motives by which mankind are ordinarily influenced. Secondly, that another large portion of natural Equity, in a modified form, is administered by the Courts of Law, and is denominated Law, in contradistinction to what is technically termed Equity. And thirdly, only a portion, therefore, of natural Equity, and that in a modified form, is administered in a Court of Equity; and that portion is technically, specifically, and conventionally called Equity,

Another large portion is administered, in a modified form, in courts of law.

That which is administered in courts of equity is therefore only a portion of natural justice, and in a modified form.

INTROD. SEC. I.

in contradistinction as well to the two other portions of Equity, or to natural, abstract, and universal Equity or justice in general, as to legislative enactments, and arbitrary, feudal, or simply conventional rules.

Where rights are not enforced at law, but are in equity, so that equity has exclusive jurisdiction over them.

II. 1. There are particular rights which come within some general class of rights enforced at Law, or capable of being judicially enforced, not only in particular instances, and to the benefit of particular individuals, but in all cases, and to the advantage of the community at large; and yet there are no forms of action by which relief can be obtained in respect of such particular rights, and they are consequently left to conscience by the Courts of Law; but being capable of being enforced by proceedings in Equity, and being of a character demanding judicial sanction and interposition, Courts of Equity readily interfere and afford relief. In these cases, therefore, Courts of Equity have exclusive jurisdiction. This, for example, is the case with trusts, for the most part; with the right to relief in many cases of accident, mistake, fraud, penalties, and forfeitures; and with the right to protection against anticipated loss or injury. (See § 29, 962.)

Where equity has concur-

2. There are many other cases in which

the kind of relief which is afforded by Courts of Law is inadequate, but in which Courts of Equity can give the precisely appropriate relief. For example, Equity will often enforce the specific performance of a contract; whereas Courts of Law can only give damages for the breach thereof. (See § 30, 33.)

rent jurisdiction, on account of the inadequacy of the legal relief;

There are also cases in which adequate and complete relief could be had at Law; but in order to obtain it, circuity of action or multiplicity of suits would be necessary; whereas complete justice can be done by a single suit in Equity. (See § 496, 621, 853, 854.)

or to avoid circuity of action, or multiplicity of suits;

Again; Courts of Law cannot do more than pronounce a positive judgment in a settled form, either for the plaintiff or the defendant, irrespective of the peculiar circumstances of the case; whereas Courts of Equity can adapt their decrees to all the various circumstances which may arise, and can take due care of the rights of all who are in anyway interested in the property in litigation. (See § 26, 437, 27, 28.)

or to take due care of the rights of all;

In these three classes of cases, Equity has a concurrent, and practically an exclusive jurisdiction. Indeed in some, if not in all of the last class of these cases, Equity will assert

INTROD. SEC. I.

an exclusive jurisdiction, by granting an injunction against proceedings in other Courts. (See Chapter on Legacies, *infra*.)

or on account of the original denial of due relief at law;

And in cases where the Courts of Law originally did not afford such adequate relief, Courts of Equity exercise a concurrent jurisdiction, unless prevented by a legislative enactment, although the former Courts have subsequently given such relief, because they can have no power to circumscribe the jurisdiction of Courts of Equity. (See § 64 i, 81.) If the jurisdiction of the Court of Chancery were necessarily to cease as soon as a Court of Law assumed jurisdiction, it would involve the administration of justice in the most hopeless uncertainty and confusion; and it might be otherwise extremely prejudicial thereto; as the Courts of Law might sometimes entertain suits, where they had not the proper means of investigating the truth, or the necessary ability to afford full relief, or to take due care of the rights of all the parties.

or the doubtfulness of obtaining such relief.

And so if it is doubtful whether the Courts of Law can give such relief, the Courts of Equity have jurisdiction.

Where equity has auxiliary jurisdiction.

3. In some cases a matter is most properly cognizable at Law, and Courts of Law could

afford due relief, if they had that evidence which a Court of Equity could obtain. In these cases Courts of Equity exercise an auxiliary jurisdiction to provide the Courts of Law with that evidence. (See Title VI. Ch. I. *infra*, and see § 64 k, 673.)

Where it has no jurisdiction.

4. Where it is clear that the Courts of Law could always afford adequate relief, without the aid of Courts of Equity, and without circuity of action or multiplicity of suits, and could take due care of the rights of all who are interested in the property in controversy, Equity has no jurisdiction. (See § 33, 684 a & c, 686.)

Nor, as already observed, have they any jurisdiction in the case of those classes of rights which could not be judicially enforced without occasioning a greater general mischief or inconvenience than that which results from leaving them to be disposed of *in foro conscientiæ*.

Equity is a suppletory system.

III. From the foregoing remarks, it will be evident that Equity Jurisprudence is a suppletory system. It steps in only to supply the deficiencies in Legal Jurisprudence.

Advantages of the common law procedure.

In many cases, as we have already seen, Courts of Law act on equitable principles in the same way as Courts of Equity; and they

INTROD. SEC. I.

are not bound by precedent more rigorously than Courts of Equity. And in the cases of which they commonly take cognizance, they can afford adequate and complete relief. Moreover, the proceedings at Law are simple and expeditious; attended with comparatively little expense; as free as anything that could be devised, from danger of prejudice or partiality, or corrupt or oppressive influence; well adapted, in general, to the cases to which they are usually applied; not open to the objection of exposing the plaintiff or defendant to the temptation of perjury; and only requiring the evidence of a single witness, which, in a multitude of instances, is all that could be obtained.

Disadvantages of the equity procedure.

On the other hand, the proceedings in Equity are inherently and irremediablycomplex, cumbersome, tedious, and expensive. The decision moreover rests with a single individual, and, although it is improbable to the extreme, yet it is possible, that the individual with whom the decision so rests may, perhaps unknown to himself, be biased by prejudice or partiality, or be under some corrupt or oppressive influence. Besides this, the defendant is required to answer the allegations of the bill on his oath,

which of course exposes him to a strong temptation to perjure himself: and if he expressly denies those allegations, no decree will be made against him, unless his answer is contradicted by two witnesses, or by one witness whose testimony is supported by corroborative circumstances of sufficient weight; because the denial of the facts by the answer on oath, is equally strong with the affirmation of them by one witness, unsupported by corroborative circumstances. (2 Dan. C. P. 404—406.)

Consequent propriety of equity jurisdiction being circumscribed within its present limits.

On these accounts, it would be far from desirable that Courts of Equity should take cognizance of the matters that are usually brought into Courts of Law, which have the power of doing justice in those cases, as effectually as Courts of Equity could, and by proceedings of a more simple and expeditious, and a less expensive and objectionable character.

Defectiveness of the common law procedure and merits of the equity procedure, and consequent propriety of equity possessing its present jurisdiction.

At the same time, however, it would be equally undesirable that Courts of Law should take cognizance of the matters which are usually brought into Courts of Equity: for the machinery and powers of Courts of Law are as ill-suited to those cases, as they are well-suited to those which usually form the

subject of legal proceedings; and the machinery and powers of Courts of Equity are as admirably adapted to the cases which usually come before them, as they are ill-adapted to those which are usually determined in Courts of Law.

Those very parts of the Chancery system which are open to objection in one point of view, are worthy of the highest commendation in others. The same ends could not be attained with equal certainty by any other and less objectionable means. When, for example, we consider how few would venture to commit perjury, and the danger of detection to those who may be wicked and daring enough to do so; and when we reflect that there are numberless transactions with the circumstances of which no one is acquainted but the parties themselves, and numberless acts which are known only to the man who has been guilty of them; it is impossible to estimate the value of that procedure, which, in countless instances, brings forth to the light of day those things which were done where they could be witnessed by no human eye; which takes down, as with a reporter's pen, communications uttered in whispered accents, upon a solemn promise of inviolable secrecy;

which unlocks, as it were, and discloses the contents of the strong room and the bureau; which virtually brings back from the devouring flame those documents that have been destroyed in the hope of eluding the claims of justice; which penetrates the innermost recesses of the heart, discovers its latent springs of action, unveils its hidden purposes, and exposes to full view its embryo designs.

Again; when we consider the high sense of honour, the strict integrity, the conscientious care, and the profound learning of the Equity Judges, it would appear utterly unreasonable to repose *less* confidence in their decisions than in the verdict of a body of jurymen, some of whom, though free from all imputation in a moral point of view, may be, and frequently are, as obtuse as they are upright, while another part of the same body, even admitting them to be men of principle, may be as shallow as they are sharp, and as self-conceited and mistaken as they are ignorant.

The other parts also of the Equity system might be fully vindicated, if any such vindication were necessary and requisite to the right discussion of the present subject. On the whole, indeed, perhaps it is not saying

INTROD. SEC. I.

too much, to assert, that under no other system has justice been done so thoroughly, and with such never-failing certainty, as it is under the Equity system of this country.

Connexion of these considerations with the subject.

The train of observations which have just been made, although touching upon the pleadings and practice rather than the doctrines of Courts of Equity, have been strictly pertinent to the subject of our inquiry. For, it is the peculiar procedure of these Courts, which has given to Equity Jurisprudence, or enabled it to assume and maintain, an existence separate and distinct from Law, to many portions of which it bears so close a resemblance.

And these observations would seem to point out a solid and the true ground for the existing division of the Juridical Courts into Courts of Law and Courts of Equity; the true principle of the line of demarcation between them; and the true character of Equity Jurisprudence, as a system at once and with great propriety, of a merely suppletory character, and yet not to be dispensed with, or superseded, by increasing or extending the appliances of the Courts of Law; as a system at once open to grave, inherent, and

irremediable objections, and yet worthy of the highest admiration.

Concluding remarks on the amalgamation or union of law and equity.

To invest the Courts of Law with the powers and appliances of Courts of Equity, to be used and exercised in those cases which usually form the subject of equitable proceedings, would be to leave the division of jurisprudence and juridical practice in most respects substantially the same as it is now; just as the Court of Review is as distinct a Court from the Court of Chancery as it was formerly, although it is now held in one of the buildings where the Courts of Equity sit, and an Equity Judge presides in it. Effectually and thoroughly to amalgamate the two systems of Law and Equity, is an impossibility. And even the attempt to unite them, would be to destroy that division of labour which now exists, so happily for the efficiency of the bar and the interests of the suitor; to create the most baneful confusion; and most materially and prejudicially to affect the due administration of justice and Equity.

Section II.

Of the General Maxims of Equity Jurisprudence.

Introd. Sec. II.

In addition to those maxims which are acted upon as well in Courts of Law as in Courts of Equity, and besides various other maxims which in terms apply to particular parts of the Equity system, there are certain general maxims peculiar to Equity, which it is of the greatest use rightly to understand, and to bear in mind, whether in reading or in practice.

1. No right without a remedy.

I. It is a maxim, that Equity will not suffer a right to be without a remedy. (1 Cru. Dig. X. 1, 50.)

Importance of the maxim.

It will be evident from the preceding Section, that this lies at the very foundation of a large proportion of Equity Jurisprudence, as a suppletory system.

Qualification of its generality.

But it will also appear from the observations made in that Section, that this maxim must be regarded as referring exclusively to rights which come within a class of rights enforced at Law, or capable of being judicially enforced without occasioning a greater detriment or inconvenience to the public than would result from leaving them

to be disposed of *in foro conscientiæ*. And it must also be understood to refer to cases where the party who is remediless at law has not sacrificed or lost his remedy by his own act or laches (see § 684 a & c), and where there is no equal or superior adverse right.

2. Equity will administer a due remedy where it cannot or could not be had at law.

II. But not only will Equity often administer a remedy where the Law will not and cannot, but it will also afford relief, as we have already seen, where the Courts of Law cannot or originally did not clearly give adequate and complete relief, at least without circuity of action or multiplicity of suits, or cannot take due care of the rights of all who are interested in the property in litigation.

3. But equity will not interfere where the courts of law could administer a due remedy.

III. But, as we have also seen, where it is clear that the Courts of Law did always afford adequate and complete relief without the aid of a Court of Equity, and without circuity of action and multiplicity of suits, and could take due care of the rights of all persons interested in the property in litigation, there Equity has no jurisdiction.

Illustration drawn from the case of rents.

Thus, where there was always an adequate and complete remedy at Law for the recovery of rent, either by an action or distress, no

suit will be entertained in Equity, although the remedy in Equity may be more beneficial. The cases in which a suit is commonly entertained in Equity for this purpose, are such as stand upon some peculiar Equity; as where the premises out of which the rent is payable are uncertain; or where the time or amount of the payment is uncertain; or where a discovery or an apportionment is wanted; or where the remedy at Law is obstructed or evaded by fraud, or is gone without laches; or where none ever existed; or where it is inadequate, incomplete, or doubtful. (See § 684 a & c, and 686.)

4. Equity follows the law.

IV. Although Equity will go beyond the Law in supplying a remedy in the cases above mentioned, yet it is a well known maxim, that Equity follows the Law. (See § 64.)

True meaning of the maxim.

The true meaning of this would seem to be, that Equity is governed by legislative enactments and the rules of Law, in regard to legal estates, rights, and interests; and that it is regulated by the analogy of such legal estates, rights, and interests, and the legislative enactments and rules of Law affecting the same, in regard to equitable estates, rights, and interests, where any such analogy

plainly subsists; if, in each case, there are no peculiar circumstances rendering it absolutely necessary to deviate from this rule, or creating an equitable obligation in one of the litigant parties, and an equitable correlative right in favour of another litigant party, and requiring a different course to be taken in the particular case, without overturning or destroying the general application of any legislative enactments or rules of Law that may, in terms or by analogy, apply to the case.

There may indeed be cases in which Equity has followed the Law, even where there have been such peculiar equitable circumstances. But it is conceived that these must be cases in which the Court has (perhaps improperly) declined to exercise the authority which it really possessed and has ordinarily exerted.

To affirm that Equity follows the Law, in any less limited sense than that above pointed out, would be to negative the existence of a large portion of Equity Jurisprudence, if not to assert that there is no such thing as Equity, as distinct from Law. But to affirm that Equity follows the Law, in the restricted sense above pointed out, is merely to assert what is unquestionably true, and most important to be remembered; namely, that

INTROD. SEC. II.

Equity will suffer legislative enactments and the rules of Law to govern, and the course of Law to proceed, as far as it can without sacrificing claims grounded on peculiar circumstances which render it incumbent upon a Court of Equity to interpose, in accordance with the maxim previously mentioned, that Equity will not suffer a right to be without a remedy.

Illustration of the maxim in regard to trusts executed.

In illustration of the maxim, as it applies to equitable estates, rights, and interests, it may be observed that the limitations by which equitable estates and interests are created by way of trust executed, that is, a trust formally and finally declared by the instrument creating it, are construed in the same manner as similar limitations of legal estates and interests would be construed in a Court of Law; so that, for example, what would create an estate tail in the one case, will create an estate of the same kind in the other case. But such a constructive assimilation does not always take place in regard to equitable estates and interests, created by way of trust executory, which, as opposed to a trust executed, is a trust not formally and finally declared by the instrument creating it, but intended to be so declared by

Maxim does not apply to trusts executory in all respects.

some future instrument. For, in the cases of trusts executory, there is often no substantial analogy, forming a ground for such assimilation; because the words are not so much actual limitations, such as those by which legal estates and interests are created, as instructions or intimations as to the mode in which the author of the trust wishes the property to be settled by some future conveyance, settlement, or assurance referred to in the instrument creating the trust; and therefore to be construed according to the intent of the party, as presumable from the nature of the case, or from the other parts of the instrument, rather than according to what would be the strict operation of the words, supposing them to be actual limitations contained in a formal and final instrument. (As to these trusts, see Smith's Executory Interests, annexed to Fearne's Treatise, § 489—502, and § 601—637.)

Illustrations of the qualification added in the writer's statement of the true meaning of the maxim.

In illustration of the qualification that Equity follows the Law only where there are no such peculiar circumstances as above mentioned, it may be observed, that Equity follows the Law in regard to the rule of primogeniture, although that rule, in any

Law of primogeniture.

particular instance in which it is so followed, may be productive of the greatest hardship towards all the younger members of a large family, who, in one sense, by the operation of the rule, may be left without any sort of provision, while the eldest son may be placed in a state of the greatest affluence. But these are not peculiar circumstances creating an equitable right to relief in favour of the younger children against the eldest son, and demanding the interposition of a Court of Equity. The mere absence or want of a provision, a circumstance arising perhaps from the culpable neglect of the parent, can create no equity against the eldest son. He has the right to the descended or entailed estate, without any reference to the circumstances of the other members of the family; and the fact that they have not been provided for by their parent can impose on the eldest son no obligation, legal or moral, to divest himself, and can give the younger children no equitable right to strip him, of that provision which the Law has appointed him. No relief could be given in such a case as this, without directly limiting and derogating from a rule of Law, which a Court of Equity has no

power to do. But if an eldest son should prevent his father from executing a will devising one of his estates to a younger brother, by promising to convey such estate to such younger brother, although that estate would at Law descend to the eldest son, a Court of Equity would doubtless interpose, and prevent the eldest son from asserting any claim to it. (As to this, see cases cited, § 64.) So Equity will often support the defective execution of powers, where at Law the act would be wholly nugatory. (See § 64 a.) And in cases under the old Statute of Limitations, (21 Jac. I. c. 16,) Equity often interfered, notwithstanding the time fixed by the Statute had expired, where it would have been inequitable to have allowed the Statute to be a bar; as when a person perpetrated a fraud, which was not discovered till the statutory bar applied at Law or where a person carried on an unfounded litigation, protracted so as to subject his adversary to the statutory bar at Law. (§ 1521.) But although, in these cases, Equity did not follow the Law, yet it did not overturn or destroy the general application of the enactment. It only refused to apply it in particular instances, where

Powers.

Statute of Limitations.

INTROD. SEC. II.

there were peculiar circumstances creating an equitable right to relief, demanding the interposition of the Court in its support, and capable of being enforced without at all derogating from the general application of the enactment in question. So far from derogating from the Statute, Equity was regulated by analogy to the Statute, as to the precise time fixed for asserting equitable titles and claims, to which the Statute did not apply. (See § 64 a, 1520. And for other illustrations of the qualification of the rule above stated, see Chapter on Express Trusts, *infra.*)

5. *Vigilantibus, non dormientibus, æquitas subvenit.*

V. It is a maxim that, *vigilantibus, non dormientibus, æquitas subvenit:* the meaning of which is, that equity discountenances laches; and, independently of any Statutes of Limitation, has always refused to interfere where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights. (§ 1284 a, 1520.) Under such circumstances, it would in many cases be impossible to interfere, without doing injustice to third persons who had acquired interests in the property during the intervening period.

6. Where there is equal equity, the law must prevail.

VI. Where there is equal Equity, the Law must prevail; in other words, if the defend-

ant has a claim to the protection of a Court of Equity, equal to the claim which the plaintiff has to the assistance of the Court, there the Court will not interpose, but will leave the matter as it stands at Law: for, in the language of another maxim, *in æquali jure, melior est conditio possidentis.* (§ 64 c.)

7. Equality is equity.

VII. Another maxim is, that Equality is Equity, or, that Equity delighteth in Equality. (§ 64 f.) Acting on this principle, Equity leans strongly against joint-tenancy, as it is attended with the inseparable incident of the right of survivorship. For, although it is true that each joint-tenant may have an equal chance of being the survivor, yet this is but an equality in point of chance; as soon as one dies, there is an end to the Equality between them: on that event, the whole accrues to the survivor. And the equal certainty of having an absolutely equal share, or a share proportionate to the amount of the purchase-money advanced by a party, which is an equal share so far as the justice of the case will permit, is considered in Equity far better than an equal chance of having the whole or none of the property purchased. The former is considered to be the true and just Equality.

Illustration drawn from the case of a joint purchase or mortgage.

INTROD. SEC. II.

And therefore, if two persons jointly purchase, or take a mortgage of an estate, and advance the purchase or mortgage money in unequal proportions, on the death of either of them, Equity, acting on the maxim that Equality is Equity, will hold the survivor a trustee for the representatives of the deceased, as to a share proportionate to the amount of the money so advanced by him. (See § 1206.) And this furnishes another illustration of the violation of the terms of the maxim, that Equity follows the Law, though not of the qualified and true sense of that maxim, as above explained.

8. He who comes into equity must come with clean hands.

VIII. Another maxim is, that he who comes into a Court of Equity, must come with clean hands.

Illustration drawn from a fraudulent transaction.

So that if a person seeks to cancel, set aside, or obtain the delivery up of an instrument on account of fraud, and he himself has been guilty of wilful participation in the fraud, Equity will not interpose in his behalf, unless the fraud is against public policy, and public policy would be defeated by allowing it to stand. (See § 695.)

Qualification of the maxim.

The rule must be understood to refer to wilful misconduct in regard to the matter in litigation, as in the foregoing example, and

not to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party in the cause has no concern.

9. He who seeks equity must do equity.

IX. It is also a maxim, that he who seeks Equity, must do Equity. (§ 64 e.)

Illustration drawn from an usurious transaction.

Thus a Court of Equity will not set aside an usurious transaction, on a bill filed by the borrower, unless upon the terms that he will pay the lender what is *boná fide* due to him. It must not be inferred from this, however, that the Court will oblige the borrower to pay what is so due, on a bill filed by the lender to enforce his claim (see § 64 e); for that would be contrary to the maxim, that he who comes into Equity, must come with clean hands.

10. Equity looks on that as done, which ought to have been done.

X. The maxim, that Equity looks upon that as done, which ought to be done, is also acted on in some cases, (as in the case of agreements) in favour of persons who have a right to pray that the acts might be done, so as virtually to place them, as near as may be, in the same advantageous position as if those acts had been done in the way in which, and at the time when, they ought to have been performed. (See § 64 g; and see Title II. Chap. VIII. *infra.*)

INTROD. SEC. II.

11. Equity will act *in personam*, in respect of property out of the jurisdiction.

XI. It may be observed, in this place, that it is a rule, that although the property in controversy be situate in a country out of the jurisdiction of the Court, whether within the English dominions or not, yet the Court, in all cases where the proper parties are within the territorial process of the Court, will afford relief, so far as it can be afforded by proceeding against the persons, and not directly against the property. (See § 1290—1300.) Thus, a bill cannot be brought for a partition of land situate in a country out of the jurisdiction; for the Court cannot award a commission there. (§ 1292.) But a bill may be maintained for an account of rents and profits of land out of the jurisdiction, or for a specific performance of an agreement respecting such land. (§ 1291, 1300, 744.) And the Court has gone so far as indirectly to overhaul the judgments of foreign Courts, and even the sales made under those judgments, where fraud has intervened in those judgments, or a grossly iniquitable advantage has been taken. (§ 1294.)

A partition cannot be made of such property.

But an account may be had.

And a foreign judgment may be indirectly overhauled.

SECTION III.

Of the Division of Equity.

The subject of Equity Jurisprudence may be conveniently, and perhaps most properly, treated under the following heads, designated according to the more distinctive characteristics of the relief afforded, or the general objects sought to be effected.

I. Of Remedial Equity, specifically so termed.

II. Of Executive Equity.

III. Of Adjustive Equity.

IV. Of Protective Equity, irrespective of disability.

V. Of Protective Equity, in favour of persons under disability.

VI. Of Auxiliary Equity.

TITLE I.

OF REMEDIAL EQUITY, SPECIFICALLY SO TERMED.

lef-acc. An unforeseen & injurious acc- not attri to any neg- or mis-con- of the pty injured - & not remediable under the kd of mistake - fraud or other wrong but conduct —

" Mis- an act which ought not have been done or an omission which would not have occurred but from ignorance forgetfulness - mental incap suspense - mis-place - confid. or misconception

CHAPTER I.

OF ACCIDENT.

An accident, in the usual sense of the term, is an occurrence not referable to design. Definition of accident, in the usual sense of the word.

But accident, as remediable in Equity, may be defined to be an unforeseen and injurious occurrence, not attributable to the neglect or misconduct of the party injured, and not remediable under the head of mistake, fraud, or other wrongful conduct. Definition of accident, in the technical sense.

Thus the reduction, by Act of Parliament, of public stock directed by will to be set apart to answer an annuity, is an accident, remediable in Equity, by decreeing the deficiency to be made up against the residuary legatees. (§ 93.) Illustration in the case of a reduction of stock.

I. There are many cases of accident in which due relief can be obtained at Law; and there, Equity will not interpose. (§ 79.) I. Accidents remediable at law.

II. On the other hand, there are many cases in which no remedy can be had either at Law or in Equity. (§ 79.) Thus, II. Accidents not remediable at law or in equity,

1. No relief will be granted where the as in cases of culpability of the sufferer;

accident arose from the gross neglect or fault of the party seeking relief. (§ 105.)

or of an absolute agreement,

2. And where a person has expressly and absolutely contracted or covenanted to do a particular thing, it is no ground for the interference of a Court of Equity, that he has been prevented by accident from fulfilling his engagement, or from deriving the full benefit of the contract on his side. For he might have prevented any injury to himself from accident, by making proper exceptions; but since he omitted doing so, the Law will

to repair,

presume an intentional general liability. So that if a lessee covenant to keep the demised premises in repair, he will be bound to do so notwithstanding any unavoidable accident by which they are destroyed or injured.

or to pay rent;

(§ 101.) And where there is a covenant to pay rent during the term, without any proper exceptions, it must be paid notwithstanding the premises are accidentally burnt down during the term. (§ 102.)

or of countervailing equity, or want of equity;

3. Nor will relief be granted in favour of a person whose equitable right to assistance is not equal, or not more than equal to the equitable right to protection which is possessed by the party against whom the relief is sought. For this reason, relief is not given

against a *bonâ fide* purchaser for valuable consideration, without notice. (See § 108.)

And so relief will not be granted in favour of a person, who, although a great loser through an accident, has no equitable title to relief, or as little as the person against whom relief is sought. Thus, no relief will be afforded to the legatees or devisees under a will defectively executed (see § 105 a, 106 ;) for they, being mere volunteers, have as little Equity as the heir or next of kin, or even less, as it is a maxim that *fortior et æquior est dispositio legis, quam hominis* (Co. Litt. 338, a); and therefore the legal right which has vested in the latter will not be taken away ; for the maxim is, that where the Equity is equal, the Law must prevail.

as where a will is defectively executed.

III. But where a Court of Law cannot, or, in similar cases, originally could not, or did not, give adequate relief, and take due care of the rights of all persons interested, and the party prejudicially affected is free from blame in respect of the accident, and has a conscientious title to relief, it will be granted by the Court of Chancery, if it can without derogating from any positive agreement, or violating any equal or superior Equity in

III. Accidents remediable in equity.

another person. (See § 28, 64 i, 81, 85, 89, 101, 105, 106, 109.) So that,

1. Relief in case of inability to establish a right.

1. Where there is or was such a want of justice at Law, Equity will interfere in favour of a person who, from a long possession or exercise of a right, may fairly be presumed to have a legal title, and yet the legal evidence thereof is destroyed, lost, or concealed, or, from some other accident, he is unable to establish his right. Thus,

(1) Jurisdiction for discovery in cases of destroyed, lost, or suppressed deeds, and

(1.) In cases of destroyed, lost, or suppressed deeds, the jurisdiction of Equity, merely to compel a discovery, would seem to be universal, because this is a preliminary assistance peculiar to Equity. And where a discovery only is sought, Equity will grant it without any affidavit of loss: because a person would not file a mere bill of discovery unless the instrument were really lost.

jurisdiction for relief in such cases.

But, in these cases, the jurisdiction for relief, in addition to a discovery, is of limited extent: for, in some of these cases, Courts of Law have all along been able to administer, and have been in the habit of doing, complete justice. (§ 83, 84.) And where such relief is sought in Equity, there must be an affidavit of the fact of destruction, loss, or suppression in the bill; because, in such cases, it

Requisites to maintain the jurisdiction for relief in such cases.

is desired to change the forum, from a Court of Law, which, *primâ facie*, is the proper forum, to a Court of Equity, and therefore an affidavit ought to be required, to prevent an abuse of the process of the Court. There must also be an offer of indemnity in the bill, when the nature of the case seems to require it. (See § 83.) And in order to maintain the suit, it is further indispensable that the destruction, loss, or suppressal, if not admitted by the answer, should be established, at the hearing of the cause, by satisfactory proofs. (See § 88.)

Instances in which equity has jurisdiction for relief in those cases.

Among other instances in which Equity exercises jurisdiction for relief in the cases of destroyed, lost, or suppressed deeds, relief will be given in Equity where the plaintiff avers that a deed relating to land has been either destroyed or concealed by the defendant, but he (the plaintiff) knows not whether it has been so destroyed, or whether it has been only concealed: for there a Court of Equity will make a decree, (which a Court of Law cannot,) that the plaintiff shall hold and enjoy the land until the defendant shall produce the deed, or admit its destruction. (§ 84.)

So if a deed concerning land is lost, and

the party in possession seeks a discovery, and prays to be established in his possession under it, no remedy can be had except in Equity. (§ 84.)

A person may also come into Equity for payment of a lost bond; because, until a recent period, no relief was given at Law on account of the want of a profert (§ 81, 82); and besides this ground of the jurisdiction in Equity, it is often proper to grant relief upon the terms of the party giving a bond of indemnity; and a Court of Law cannot insist on such a bond as a part of the judgment; and although it has sometimes required the previous offer of an indemnity, yet such an offer may be unsatisfactory in many cases; for, in the mean time, the circumstances of the party to the bond of indemnity may undergo a great change. (§ 82.)

(2) Jurisdiction in cases of lost unsealed securities.

(2.) Courts of Law could always enforce payment of money due on a lost negotiable note or other unsealed security; because no profert was necessary, and no oyer was allowed of such securities. Courts of Equity, therefore, will not entertain a bill for relief in such a case, unless there is an offer of indemnity in the bill, constituting a ground of jurisdiction. (§ 85, 86.)

2. Relief in cases of the defective execution or non-execution of powers.

2. In the absence of any countervailing Equity, relief will be granted by a Court of Equity, in case of a defective execution of a mere power, where it is created by an ordinary assurance, and where the defect is not of the very essence of the power, and the defective execution is in favour of a charity, or of persons for whom the donee of the power is under a legal or moral obligation to exercise it, as of a purchaser, a wife, or a legitimate child. And the mere manifestation of an intention to execute the power, provided it clearly appears in writing, will be deemed a defective execution of the power.

But Equity will not interpose in the case of a non-execution of a mere power; for that would be depriving the donee of the right of discretion in regard to the exercise of the power. Nor will Equity support a defective execution of a power, in favour of the donee of the power, or of a husband, or of a grandchild, or of more remote relations, or of strangers generally. Nor can Equity dispense with the regulations prescribed, where the power is created by Statute, at least where they constitute the apparent policy and object of the Statute, or with the consent of

persons whose consent is required. Nor will an execution by an absolute deed, instead of by will, be supported; as that would be repugnant to the power; since it would not be revocable, like a will.

But where the power is coupled with a trust, Equity will grant relief even in case of the non-execution of the power; because, in this case, the donee was under an obligation to exercise it. (See, as to these propositions respecting powers, § 94—97, 169—177.)

CHAPTER II.

OF MISTAKE.

A MISTAKE, as remediable in Equity, may be defined to be, an act which would not have been done, or an omission which would not have occurred, but from ignorance, forgetfulness, inadvertence, mental incompetence, surprise, misplaced confidence, or imposition. Definition of.

The following propositions appear to be deducible from the cases on the subject:

I. Where the mistake is unilateral, and the person suffering through it, is the party by whom it was made, relief will not be granted, unless there is some circumstance which gives rise to a presumption that there has been some undue influence, misrepresentation, imposition, mental imbecility, surprise, or confidence abused. (See § 117—120, 134, 135, 137, 138.) I. Mistake made by the sufferer alone,

In regard to mistakes in matters of Law, it is a maxim that *ignorantia legis non excusat*. But where the mistake is one of title, arising from ignorance of a principle of in a matter of law.

Law, of such constant occurrence as to be understood by the community at large, this is considered sufficient to afford such a presumption as above mentioned, so as to entitle the party to relief. (See § 128, 137.)

In a matter of fact.

And in regard to mistakes in matters of fact, relief will be granted on the same presumption, where the mistake is unilateral, and the fact was material to the act or contract, and was not doubtful from its own nature, and was a fact which would not be ascertained by such diligence or care as is usual in transactions of the like nature, and of which the other party was under a legal obligation to inform the mistaken person. (See § 117, 118, 141, 146—148, 150.)

II. Mutual mistake.

II. Where the mistake is mutual, the transaction will be binding, except there has been a mutual surprise, or the mistake consists in supposing that the subject-matter of the contract existed when in reality it was not in existence, or that a thing was sold when in reality it was not. (§ 134, 140—143 a, 161, note.)

III. Compromise of doubtful rights.

III. In the case of a compromise of doubtful rights, if all the parties are in a state of mutual ignorance, or they are all acquainted with the doubts which exist in

their favour, the compromise will be binding. But where one or more of them is or are not aware of the doubts existing in his or their favour, while the fact that such doubts exist is known to the other or others of them, the compromise will not be binding (see § 131); because, in that case, there is room for the presumption of surprise or confidence abused, and the very nature of the transaction made it requisite that all the parties should be on an equality as regards knowledge or ignorance of the doubts existing in their favour.

IV. Correction of a mistake in a written instrument, or in regard thereto, where the mistake is admitted or proved.

IV. If a bill is filed to rectify a mistake in a written instrument, whether executed or executory, or a mistake in omitting any acts necessary to give validity to such instrument, and such mistake is clearly made out by admissible and satisfactory evidence, or is admitted by the answer, Equity will supply the defect arising from the omission of those acts, or rectify such instrument by inserting that which has been omitted, striking out that which ought not to have been inserted, or varying the language thereof, (§ 152, 157, 166, 168, &c. and see Sugd. V. & P. ch. 3, sect. 11, pl. 2,) except as against a

bonâ fide purchaser, for valuable consideration, without notice. (§ 165.)

But it should be observed, that where the final instrument of conveyance or settlement differs from the preliminary contract, that very circumstance affords of itself some ground for presuming an intentional change of purpose, unless, from some recital in it, or from some attendant circumstances, it appears to have been intended to be merely in pursuance of the original contract. (§ 160.)

And as regards the admissibility of the evidence, it is a rule of the Common Law, independently of the Statute of Frauds, that parol evidence is not admissible to disannul, substantially add to, subtract from, qualify, or vary a written instrument. (See § 153, 158; and see also Sugd. V. & P. ch. 3, sect. 8, pl. 2, 33, 36, &c. and sect. 11, pl. 5.) But parol evidence of mistake or fraud, supported by documents or corroborative circumstances, is admissible for this purpose. (See Sugd. V. & P. ch. 3, sect. 11, pl. 1, 6—14.) And,

V. Correction of a presumable mistake in a written instrument.

V. Equity will grant relief where a mistake in a written contract is fairly presumable from the nature of the transaction. And

hence where there has been a joint loan to two or more obligors, and they are only made jointly liable, the Court will make the bond joint and several. (§ 162.)

VI. Avoidance of a written instrument on the ground of mistake.

VI. An instrument may be entirely set aside on the ground of mistake or fraud on a bill filed for that purpose. And an executory agreement which has not been acted on, may be totally avoided on the same ground by the answer of a defendant against whom a specific performance is sought. (See § 161; and see Sugd. V. & P. ch. 3, s. 8, pl. 18, 20—24, &c.) It is an easier matter totally to avoid an agreement, than to vary it. For, in the former case, the Statute of Frauds has no influence whatever; since "it does not say that a written agreement shall bind, but that an unwritten agreement shall not bind." (Sugd. V. & P. ch. 3, s. 8, pl. 32.)

VII. Mistake in the execution of powers.

VII. Equity will also supply defects in the execution of powers, on the ground of mistake, in the cases mentioned in the preceding Chapter under the head of Accident.

VIII. Mistaken bequest or revocation.

VIII. Where a legacy is bequeathed or revoked, and it appears on the face of the will that such bequest or revocation was

made under a mistake as to facts therein referred to, and it is morally certain that the testator would not have made such bequest or revocation if he had not been so mistaken, such bequest or revocation will be void in Equity. (See § 182—183.)

CHAPTER III.

OF ACTUAL FRAUD.

THE modes of fraud are infinite; and "it has been said, that Courts of Equity have, very wisely, never laid down, as a general proposition, what shall constitute fraud, or any general rule, beyond which they will not go, upon the ground of fraud, lest other means of avoiding the Equity of the Courts should be found." (§ 186.) In accordance with the spirit of this remark, the writer abstains from attempting to give a definition of fraud *in general.* It is usually and accurately divided, however, into two large classes, designated, defined, and treated of under names of Actual Fraud and Constructive Fraud.

Unsafe to define fraud *in general*, or the extent of remedial equity on the ground of fraud.

An actual fraud may be defined to be something done, said, or omitted, which has every appearance of having been so done, said, or omitted, with the design of perpetrating what the party must have known to be a positive fraud.

Definition of actual fraud.

In the case of fraud in obtaining a will of personal estate, the proper remedy is

Jurisdiction in cases of fraud.

exclusively vested in the Ecclesiastical Court. In the case of fraud in obtaining a will of real estate, the proper remedy is in the Courts of Common Law. (§ 184.) But where the fraud does not go to the whole will, but only to some particular clause, or when the fraud is in unduly obtaining the consent of the next of kin to the probate, Courts of Equity will lay hold of these circumstances to declare the executor a trustee for the next of kin. (§ 440.)

In a great variety of other cases, fraud is cognizable at Law; as in cases of fraud in the sale of chattels personal; and in some of these cases adequate relief can be, and constantly is, obtained at Law. (§ 184, and note.) And upon principle, it would seem, that where, in any particular case, what would be deemed adequate relief, can be had at Law, and is ordinarily sought there, in cases of the same general description, Equity will not interfere, unless, in the particular case, from the want of evidence, and the inability of a Court of Law to compel a discovery, the fraud could not be established at Law, or unless it is possible that redress afforded at Law in cases of the same general description, would not constitute as

ample relief in the particular case, as that which a Court of Equity could give.

Lord Hardwicke, indeed, is reported to have said, that Equity "has an undoubted jurisdiction to relief against every species of fraud." (§ 184, note.) But where, in a particular case, adequate relief can be had at Law, and in similar cases relief is ordinarily sought there, it would seem, upon principle, that the party injured cannot come into a Court of Equity for the identical redress he could have had at Law: for that would seem to be repugnant to the character of the Equity system, and would be resorting to a more complex, tedious, expensive, and objectionable remedy, without any necessity for so doing. It is true, that if the defendant is guilty of the fraud, he has only himself to blame for what he suffers from litigation; but it may turn out that he is not guilty, and therefore the plaintiff would seem to have no right unnecessarily to involve him in a Chancery suit, when the matter could be as effectually and properly dealt with at Law. The true meaning of Lord Hardwicke's remark would seem to be, that where, in any particular case of fraud, the person injured cannot obtain adequate relief at Law, a Court

of Equity has undoubted jurisdiction to give relief, to whatever general description such particular case may belong, even though complete redress may be had at Law in the class of cases within which it comes, and although such redress might be obtained at Law in the particular case itself, if there were evidence enough to establish the fraud in a Court of Law.

Evidence of fraud.

It is a rule as well in Courts of Law as in Courts of Equity, that fraud is not to be presumed. But, on the other hand, neither at Law nor in Equity is positive proof of fraud indispensably necessary. A Court of Equity, however, will act on a lower degree of proof than that which would be required in a Court of Law. (See § 190.)

It would be impossible, and unnecessary if it were possible, to enumerate all the different instances in which Courts of Equity will grant relief on the ground of actual fraud. We shall only notice a few of them under these two heads:

Division of autual frauds.

I. Of frauds; the proof of which arises from a consideration of the conduct of the guilty party, irrespective of any peculiarity in the condition of the injured party.

II. Of frauds; the proof of which mainly

or in a great measure arises from a consideration of the peculiar condition of the parties upon whom they were practised.

I. First class of actual frauds.

1. Misrepresentation.

I. 1. Misrepresentation, whether by word or deed, constitutes fraud. Equity will not interfere, however, if the misrepresentation was in a trifling or immaterial point, or if no injury arose from it. For, in the first case, the evils of litigation would be far greater than the injury occasioned: and, as to the second case, Courts of Equity do not profess to punish guilt, but to redress wrongs. And Equity will not interfere if the party was not misled by the misrepresentation; because, in that case, he was not injured by it. Nor will the Court interpose if the misrepresentation was vague and inconclusive; or if it was in a matter of opinion or fact, equally open to the inquiry of both parties, and in regard to which neither could be presumed to trust the other. (See § 191, 192.) For the Court does not sit to redress injuries which the injured parties, by ordinary and proper care, could have prevented. It is no part of Equity Jurisprudence to encourage carelessness.

2. Concealment.

2. If a person conceals facts and circumstances which he is under some legal or

equitable obligation to communicate to the other, it amounts to a fraud for which Equity will grant relief. (§ 207.) As if a vendor sells an estate, knowing that he has no title to it, or that there are incumbrances on it, of which the purchaser is ignorant (§ 208); or if the insured does not communicate to the underwriter all facts and circumstances which increase the risk. (§ 216.)

But a purchaser is not bound to communicate his knowledge of the value of the property to the vendor (§ 207, note); for it is the business of the vendor to know and sufficiently to estimate the worth of his own property. Thus, if A, knowing that there is a mine in the land of B, of which he knows B to be ignorant, should conceal the fact, and enter into a contract to purchase the estate of B for a price which the estate is worth, without considering the mine, the contract would be good. (§ 205.)

In many cases, the maxim *caveat emptor* is applied; and, unless there is some misrepresentation or artifice to disguise the thing sold, or some warranty as to its character or quality, the purchaser is bound, notwithstanding there may be material in-

trinsic defects in it, known to the vendor, and unknown to the purchaser. (§ 212.)

In foro conscientiæ, each party is bound to communicate to the other, his knowledge of all material facts, not discoverable by the other, or of which he knows the other to be ignorant. For this is required by the golden maxim, that we should do unto others as we would that they should do unto us. But if Equity were to attempt to enforce the observance of so broad a rule, as that which is above laid down, a far greater inconvenience would ensue than that which is now experienced. For it would often be a matter of doubt with the party wronged, whether the other was really aware of the defect or advantage which he did not disclose. And, frequently, that could only be ascertained from his admissions or denials by way of answer. So that, in order to determine this, a bill seeking relief against fraud, would often be filed in total uncertainty as to the existence of that knowledge, which was of the very essence of the supposed fraud, and absolutely necessary to be proved before any ground for relief could be said to exist. And in many cases there would be the same difficulty in ascertaining whether the defect or advantage, ad-

mitting it to be known to the one party, was or was not disclosed by him to the other.

To draw a distinction which would, perhaps, give as much effect to the principle of sound morals, as would be compatible with avoiding frequent and fruitless litigation, and the discouragement of carelessness and negligence, the true course would seem to be, to hold that Equity will grant relief, if a person does not disclose any material fact, which, from the nature of the case, he must have known, and which the other party could not be expected to discover with ordinary care.

3. Inadequacy.

3. Mere inadequacy of price, or any other inequality in the bargain, does not constitute by itself a ground to avoid it. (§ 244.) For the value of things is always fluctuating, and dependent on numberless circumstances. Besides, a man may be induced by difficulties or exigencies, or for other reasons, to part with his property at a particular time, for less than that for which another would have sold it. (§ 545.) And perhaps the lowness of the price may have been the only inducement to the purchaser to make the purchase; and he may have simply acquiesced in the proposals of the vendor,

instead of being the originator of the transaction, or of being actively concerned in negotiating it, like a man whose design is to gain a fraudulent advantage over another.

Still, however, there may be such an unconscionableness or inadequacy in the bargain, as to shock the conscience, and amount to conclusive evidence of imposition or some undue influence; and, in such a case, courts of equity ought to interfere on the ground of fraud. And where there are other ingredients in the case, of a suspicious nature, gross inadequacy must furnish the most vehement presumption of fraud. (§ 246.) As, if proper time for deliberation is not allowed the party injured; if he is importunately pressed; if those in whom he placed confidence make use of strong persuasion; if he is suddenly drawn in to act, without being fully aware of the consequences; if he is not permitted to consult disinterested friends or counsel, before he is called upon to act, in circumstances of sudden emergency or unexpected right and acquisition. (§ 251.)

4. Refusal of consent to a Marriage.

4. Where gifts and legacies are bestowed on persons, on condition that they shall marry with the consent of parents, guardians,

or other confidential persons, Courts of Equity will not suffer the manifest object of the condition to be defeated by the fraudulent, corrupt, or unconscientious refusal of the parties whose consent is required to the marriage. (§ 257.)

5. Awards.

5. The Statute 9 & 10 Will. III. c. 15, authorizing submissions to arbitration to be made a rule of a Court of Record, seems to have ousted the jurisdiction of Courts of Equity over awards made under submissions pursuant to the Statute. Where the award is procured by undue means, the Statute enables the Court of which the submission is made a rule, to set it aside on affidavit. (§ 1450 and note, 1452, note.)

II. Second class of actual frauds.

II. With regard to those frauds, the proof of which mainly or in a great measure arises from a consideration of the peculiar condition of the injured party—

1. On persons of unsound mind.

1. In the case of contracts or other acts, however solemn, of persons who are idiots, lunatics, or otherwise of unsound mind, wherever, from the nature of the transaction, there is not evidence of entire good faith, or it is not seen to be just in itself, or for the benefit of those persons, Courts of Equity will set it aside, or make it subservient to

their just rights and interests. But where there is entire good faith, and the contract or other act is for the benefit of such persons, as to provide them with necessaries, there Courts of Equity will uphold it, as well as Courts of Law. (§ 227—229.)

2. On intoxicated persons.

2. If a person, at the time of entering into a contract or doing an act, was so excessively drunk as to be deprived of the use of his understanding; or if there was any contrivance or management to lead him to drink; or some unfair advantage taken of his intoxication; Courts of Equity will not lend their assistance to the person who obtained an agreement or deed from him, when so intoxicated, but will assist the party who was so intoxicated in getting rid of it, on account of the fraud of the other party in obtaining such agreement or deed from a person in such a state or by such means. (See § 230, 231.) No distinction is taken, whether the blame of the intoxication was imputable solely to the intoxicated man, or partly to the other person; because, whatever may have been the immorality of the former, and however free the latter may be from all imputation of having been in any way the cause of it, he ought not to be

allowed to retain an advantage gained by fraud of the grossest and vilest kind;—namely, that of converting the immorality of his neighbour into a source of advantage to himself. But, besides this, it would often be impossible to ascertain whether the party guilty of the fraud did not use some management to lead the other to drink, or whether the blame attached to the other alone, especially in the case of a man who was addicted to drinking.

3. On persons of weak understanding.

3. The contracts and other acts of persons who are of weak understanding will be held void in Equity, if the nature of such contracts or other acts justifies the conclusion that the party has been imposed on, circumvented, or over-reached by cunning, artifice, or undue influence. (§ 238.)

4. On persons who are not free agents.

4. Where a party is not a free agent, and is not equal to protect himself, a Court of Equity will protect him. Hence, Equity will relieve against acts done under duress, or

but under duress, or in fear,

under the influence of extreme terror or of threats. And it watches with extreme jealousy all contracts made by a party while

or imprisonment,

under imprisonment; and if there is the slightest ground to suspect oppression or imposition, it will set the contract aside.

or extreme necessity.

And, in like manner, circumstances of extreme necessity and distress may so entirely overpower free-agency, as to justify the Court in setting aside a contract on account of some oppression or fraudulent advantage attendant on it. (§ 239.)

5. On Infants.

5. Infants may, even at Law, bind themselves by contracts for necessaries suitable to their degree and quality, or by acts which the Law requires them to do. (§ 240.) But, in general, where a contract may be for the benefit or to the prejudice of an infant, he may avoid it, as well at Law as in Equity. Where it can never be for his benefit, it is utterly void. (§ 241.)

CHAPTER IV.

OF CONSTRUCTIVE FRAUD.

Definition.

CONSTRUCTIVE frauds are acts, statements, or omissions, which operate as virtual frauds on individuals, or, if generally permitted, would be prejudicial to the public welfare, and are not clearly resolvable into mere accident or mistake, but may have been unconnected with any selfish or evil design, or may amount, in the opinion of the party chargeable therewith, to nothing more than what is justifiable or allowable.

Four classes of constructive frauds.

The cases which will be noticed in the present Chapter, may be ranged in four classes.

1. Frauds on public policy.

I. Relief is granted, on the ground of constructive fraud upon public policy, against agreements, provisions, and transactions, which although they may not operate as frauds upon individuals, would, if generally permitted, be prejudicial to the welfare of the community. Thus,

1. Marriage brokage contracts.

1. Marriage brokage contracts, which are agreements whereby a party engages to give another a remuneration, if he will negotiate

an advantageous marriage for him, are void, as tending to introduce matches which are ill-advised, and not based on mutual affection, and therefore against public policy. And they are so utterly void, that they are deemed incapable of confirmation; and money paid under them may be recovered back again, in a Court of Equity, whether the marriage is an equal or an unequal one. (§ 260—263.)

2. Agreements to influence testators.

2. The same rules are applied to bonds and other agreements entered into as a reward for using influence over another to induce him to make a will for the benefit of the obligor (§ 265); for such contracts encourage a spirit of artifice and scheming, most prejudicial to the moral tone of those in whom it exists; and they tend to deceive and injure others.

3. Contracts to facilitate marriages.

3. On a similar ground, secret contracts made with parents, or guardians, or other persons standing in a peculiar relation to a party, whereby, on a treaty of marriage, they are to receive a remuneration for promoting the marriage or giving their consent to it, are held void. (§ 266.)

4. Contracts or conditions

4. On the other hand, a contract or condition is void, if it is expressly in restraint of

in restraint of marriage.

marriage generally, or if it is so restricted that it is probable that it may virtually operate in restraint of marriage generally (see § 274, 280): as, that a woman shall not marry a man who has not an estate of 500*l.* a year (§ 280), or shall not marry till 50 years of age, or shall not marry any person who is a clergyman, a physician, or a lawyer, or any person except of a particular trade or occupation (§ 283). But a condition not to marry without consent of parents or trustees or other persons specified, is good. (§ 284.)

5. Contracts or conditions in restraint of trade.

5. So, contracts and conditions in general restraint of trade are void, as tending to discourage industry, enterprize, and just competition. But a person may be restrained from carrying on trade in a particular place, or with particular persons, or for a reasonable limited time. And a person may lawfully sell a secret in his trade or business, and restrict himself from using the secret. (§ 292.)

6. Contracts for public offices.

6. Contracts for the buying, selling, or procuring of public offices are void, as tending to introduce into public offices, persons who are unfit for them in point of character and other qualifications. (§ 295.)

7. Suppression of cri-

7. So are agreements for the suppression

of criminal prosecutions (§ 294), as tending to weaken the beneficial preventive influence of Law, by diminishing the certainty of punishment. minal proceedings.

8. So are contracts which have a tendency to encourage champerty (§ 294), and agreements, bonds, and securities founded on corrupt considerations, that is, on the commission of what is contrary to the moral or municipal Law. (§ 296.) 8. Champerty and corrupt considerations.

II. Where a reasonable confidence is reposed in another person, or a peculiar influence is possessed by him in consequence of standing in a confidential relation, and he makes use of that confidence or that influence to obtain an advantage to himself at the expense of the party confiding in him or under his influence, he will not be permitted to retain any such advantage, however unimpeachable the transaction would have been, if no such confidence were reposed, or no such confidential relation existed. Thus, II. Frauds, in the case of persons in the confidential relations of

1. Contracts and conveyances whereby benefits are secured by children to their parents, if not entered into with scrupulous good faith, and reasonable, under the circumstances, will be set aside, unless third per- 1. Parent.

sons have acquired an interest under them. (§ 309.)

2. Guardian.

2. During the existence of guardianship, the relative situation of the parties occasions a general inability to deal with each other. And Courts of Equity will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, if the intermediate period is short; especially if all the duties attached to the office have not ceased, or if the estate still remains in some sort under the control of the guardian; unless the circumstances demonstrate the fullest deliberation on the part of the ward, and the most absolute good faith on the part of the guardian. (§ 317.)

But when the guardianship has entirely ceased, and a full and fair settlement of all transactions growing out of it has been made, and a sufficient time has intervened to allow the ward to feel completely independent of the guardian; there is then no objection even to a bounty being conferred upon the latter. (§ 320.)

3. Quasi Guardians or Advisers.

3. The same principles are applied to persons standing in the relation of quasi guardians or confidential advisers. (§ 319.)

4. If an attorney contracts with a person who at the time is his client, he is subject to the onus of proving the perfect fairness of the contract; as the relation between the parties must give rise to great confidence in the attorney, or to very strong influence over the client. (§ 311.) 4. Attorney.

5. Similar considerations apply to cases of a medical adviser and his patient. (§ 314.) 5. Doctor.

6. An agent will not be permitted to reap any advantage by becoming secret vendor or purchaser of property which he is authorized to buy or sell for his principal. And in all transactions directly and openly entered into between principal and agent, the utmost good faith is required; so that the agent must not conceal any facts within his knowledge which might influence the judgment of his principal as to price or value. (§ 315—317.) 6. Agent.

7. To guard against the danger of any advantage being taken by a trustee, and to remove all temptation from him, he is never permitted to partake of the bounty of the party for whom he acts, except under circumstances which would make the same valid if it were a case of guardianship. (§ 321.) And where a purchase has been 7. Trustee.

made by a trustee of the estate of his *cestui que trust*, although at a public auction, the *cestui que trust*, without showing any essential injury, may, if he pleases, insist upon trying the experiment of another sale. (§ 322.)

8. Assignees and solicitors of a bankrupt or insolvent.

8. The same doctrine applies to other persons standing in the like situation, as to assignees and solicitors of a bankrupt or insolvent's estate. (§ 322.)

9. Executor or administrator.

9. And it may be laid down as a general rule with regard to executors or administrators, that they will not be permitted, under any circumstances, to derive a benefit from the manner in which they transact the business of their office. (§ 322.)

10. Debtor, creditor, and surety.

10. Entire good faith is required between debtor and creditor and sureties. And if a creditor does any act affecting the surety, or if he omits to do any act of duty when required by the surety, and that act or omission proves injurious to the surety, the latter may set up such conduct as a defence to any suit brought against him, if not at Law, at all events in Equity. (§ 324, 325.) But mere delay on the part of the creditor, at least if some other Equity does not interfere, will not amount to laches, so as to discharge

the surety. (§ 326.) But the sureties are entitled to come into a Court of Equity, after a debt has become due, to compel the debtor to exonerate them from their liability by paying the debt. (§ 327.)

III. Relief will be granted in favour of those classes of persons, of whom, from their peculiar circumstances, irrespective of any mental incapacity, undue advantage may readily be taken, even where the transaction could not be impeached, if entered into by parties otherwise situated. Thus,

III. Frauds in case of persons peculiarly liable to be imposed on.

1. Bargains with expectant heirs, who were in difficulties at the time, will be set aside, unless the party can show that a full consideration was paid, or that the bargain was fully made known to and approved by the person to whose estate the expectant heir hoped to succeed; because it is the policy of Equity to prevent designing men from taking advantage of persons whose interests are future, and therefore apt to be under-estimated or improvidently disposed of, especially by the necessitous, the thoughtless, and the young; and it is also the object of Equity to discourage transactions by which the intentions of the ancestor or other person from whom the property was ex-

1. Bargains with expectant heirs,

pected, are disappointed; and, by cutting off relief at the hands of strangers, to oblige the heir to disclose his difficulties at home. (See § 334—340.)

and remainder-men and reversioners.

The same relief is afforded to remainder-men and reversioners, who were in difficulties at the time of the bargain, unless the party who dealt with them can show that a full consideration was paid, or that the bargain was fully made known to and approved by their parents or other persons standing *in loco parentis*, who had the means of obviating the necessity for such an alienation of their future interests; or unless such interests were disposed of by public auction. (See § 334—340.)

If the father or other person standing *in loco parentis* were unable to relieve the expectant, the concurrence of the former would seem insufficient to give validity to the bargain; for, although in this case the expectant would not be without the counsel of a person in whom he could confide, yet he would still be under the pressure of difficulties; and the existence of such difficulties might well induce the father or other person standing *in loco parentis* to acquiesce in a transaction which appeared to be unavoid-

able, however hard and unconscientious the terms thereof might be.

If the heir or other expectant, after being relieved from his necessities, absolutely, and deliberately, and on full information, confirms the transaction, or does any act by which the rights or property of the other party are injuriously affected, he will not be allowed to repudiate the bargain. (§ 345, 346.)

2. Post-obit bonds, &c. by expectants.

2. On similar principles post-obit bonds and other securities of the like nature are set aside, when made by heirs and other expectants. A post-obit bond is an agreement made on the receipt of money by the obligor to pay a sum exceeding the sum so received and the legal interest thereof, on the death of the person upon whose decease he expects to become entitled to some property. (§ 342.) Even the sale of a post-obit bond at a public auction will not necessarily give it validity. (§ 347.) If, however, these contracts are perfectly fair in other respects, relief will not be granted, except upon the terms of paying that to which the lender is equitably entitled. (§ 344.)

3. Sales to expectants at exorbitant prices.

3. Where tradesmen and others have sold goods to young and expectant heirs, at ex-

orbitant prices, and under circumstances indicative of imposition, or of undue influence, or an intention to connive at profuse expenditure unknown to their parents or other persons standing *in loco parentis*, Equity has cut down the claim to a just amount. (§ 348.)

4. Common sailors.

4. Common sailors, being so extremely generous, credulous, and improvident a class of men, that they require guardianship all their lives, Equity treats them in the same light as young expectant heirs; and contracts respecting their prize-money or wages are generally relieved, wherever any inequality appears in the bargain, or any undue advantage has been taken. (§ 332.)

IV. Virtual frauds on individuals, irrespective of any confidential relation, or any peculiar liability to imposition.

IV. Where something is said or done, or some omission is made, which operates as a virtual fraud upon an individual, but may have been nothing more than mere neglect, unconnected with any selfish or evil design; or may amount, in the opinion of the party, to nothing more than justifiable artifice, or to a fair attempt to obtain a reasonable advantage, or to an allowable act, statement, or omission, of some other kind, relief will be granted on the ground of constructive fraud. Thus,

1. Misleading.

1. Where a person, by some act, statement, or omission, knowingly produces a false impression on another, who is misled and injured thereby, whether beneficially to the other party or not; and such act, statement, or omission, when rightly considered, is contrary to plain moral duty or good faith, but yet may have been nothing more than mere neglect, unconnected with any design either to injure another, or to benefit the party who is guilty thereof, in such case, the latter alone, even though an infant or married woman, shall suffer thereby, on the ground of constructive fraud. (See § 384—390.) As where a person, knowing himself to be the owner of property, permits another to sell it, as his own, to a third person, who purchases under the supposition that the vendor has a good title, the real owner will not be allowed to assert his title to it. (§ 385, 389.) And where a person, aware of the existence of an instrument under which he might reasonably have supposed that he took some interest, neglects to make proper inquiries as to the fact, and encourages a stranger to deal with another person respecting property in which he himself is interested under such instrument, he will be

bound by the transaction. (See § 387.) And where a first mortgagee voluntarily, distinctly, and unjustifiably allows the mortgagor to retain the title-deeds, he will be postponed to a second mortgagee. (§ 393.)

2. Frauds on auctions.

2. Agreements whereby parties agree not to bid against each other at an auction, especially where the same is directed or required by Law, are held void. For such agreements may cause the property to be sold at an undervalue, and thereby injure the party interested in the proceeds of sale; and they have a tendency to prejudice the character and value of auctions in general. (See § 293.) On the other hand, if under-bidders or puffers are employed at an auction to enhance the price, and other bidders are thereby misled, the sale will be void. (§ 293.)

3. Unconscientious use of the Statute of Frauds.

3. As the Statute of Frauds was designed as a protection against fraud, it shall never be allowed to be set up as a protection and support of fraud. And hence, where from any circumstances which may have resulted from fraud, a contract has not been reduced into writing, as it ought to have been, it will be enforced against the party who is chargeable with the omission, in case he attempts

to shelter himself behind the provisions of the Statute. (See § 330.)

4. Clandestine marriage contracts.

4. If clandestine marriage contracts are designed to impose on parents or persons standing *in loco parentis*, or in some other peculiar relation to the parties, so as to disappoint their bounty, or to defeat their intentions in the disposition of their property, such contracts will be set aside, or the equities will be held the same as if they had not been entered into. (§ 275.)

5. Frauds on marriages.

5. So, relief will be granted to the injured parties, where persons, after doing acts required to be done on a treaty of marriage, render those acts virtually unavailing, by entering into other secret agreements, or derogate from those acts, or otherwise commit a fraud upon the marriage. As where a parent declines to consent to a marriage, on account of the intended husband being in debt, and the brother of the latter gives a bond for the debts, to procure such consent; and the intended husband then gives a secret counter-bond to his brother, to indemnify him against the first. (§ 269.) So where a brother, on the marriage of his sister, let her have a sum of money privately, that her fortune might appear to be as much

as was insisted on, and the sister gave a bond to the brother, to secure the repayment thereof, the bond was set aside. (§ 270.) So where a father, on the marriage of his daughter, enters into a covenant, that, on his death, he will leave her a full and equal share of all his personal estate, he cannot afterwards transfer a portion of his personal property to another child, retaining the annual income thereof for his life. (§ 382.)

6. Frauds on marital rights or expectations.

6. Relief will also be granted against acts secretly done by a woman in contravention of the marital rights, or in disappointment of the just expectations of her intended husband. As where a woman, in contemplation of marriage, and without the privity of her intended husband, makes a settlement to her separate use, or a conveyance in favour of persons for whom she is under no moral obligation to provide. (§ 273.)

7. Frauds under the stat. 13 Eliz. c. 5.

7. It has been determined that by the Common Law and the Statute 13 Eliz. c. 5, if a person makes a conveyance of property liable to be taken in execution, (unless it is for valuable consideration and *bonâ fide*, to a person who has no notice of a fraudulent intent) and at the time, or immediately afterwards, he is indebted to such an amount

that he has not ample means available to pay the debts, such conveyances will be fraudulent and void as against the creditors, to the extent to which it may be necessary to deal with the property conveyed for the satisfaction of the creditors.

It is doubtful whether a broader doctrine can be maintained. For, although it has been considered by some, that if there are debts at the time of the conveyance, it is presumed to be fraudulent in respect to such debts, without regard to their amount or the circumstances of the party; yet the contrary opinion has been held by others, and the greater weight of principle would seem to be on their side. And although some have thought that the Statute extends to stock, or choses in action, or copyholds, or any other property not liable to execution; yet, according to some modern cases, the Statute does not extend to property not liable to execution, where it has not been acquired by converting property liable to execution into property not liable thereto, for the purpose of defrauding creditors. (See § 352—374.)

8. Where creditors have first become 8. Frauds on

creditors, parties to a composition deed.

parties to a deed of composition, and have or may have thereby been the means of leading the creditors who have subsequently become parties to take that step, and the former have entered into a previous secret arrangement with the debtor, for securing to themselves greater advantages than the general terms of the composition deed warrant; such secret arrangements are entirely void, even as against the assenting debtor, or his sureties, or his friends; and money paid under them may be recovered back. (See § 378—9.)

9. Mortgage or conveyance with notice of another's title.

9. Where a person takes a mortgage or a conveyance, with full notice of the legal or equitable title of other persons to the same property, his own title will be postponed and made subservient to their title, (§ 395, 396,) except in cases within the Stat. 27 Eliz. c. 4. (See p. 79, *infra*.)

This is the case even where the property lies in a register county. For, the object of the Registration Acts being only to secure subsequent purchasers and mortgagees against prior secret conveyances and incumbrances, if a subsequent purchaser or mortgagee has notice, at the time of his purchase or mortgage, of any prior unregistered conveyance

or mortgage, he shall not be permitted to avail himself of his title against the prior conveyance or mortgage, any more than he would if the same were registered. (§ 397.) And whatever is sufficient to put a party on inquiry, (*i. e.* whatever has a reasonable certainty, as to time, place, circumstances, and persons,) is in Equity held to be good notice to bind him. And hence the purchaser is presumed to have knowledge of the instrument under which the party with whom he contracts, as executor, or trustee, or appointee, derives his power. (§ 400.) But the mere registration of a conveyance is not deemed constructive notice to subsequent purchasers, as to collateral effects, such as defeating the right of tacking mortgages. (§ 401, 402.) To constitute constructive notice, it is sufficient if it is brought home to the agent, attorney, or counsel, in the same transaction, or in one immediately preceding. (§ 408.)

He who purchases during the pendency of a suit, is bound by the decree that may be made against the person from whom he derives title; for otherwise alienations made during a suit might entirely defeat its

purpose, and there would be no end to litigation. But a *lis pendens* being only a general notice of an equity to all the world, no other person than parties or privies in representation or estate will be presumed to have notice of it, so as to be bound by it or affected with a fraud, unless he has also specific notice of the title in dispute. (See § 406, 407.)

A purchaser with notice of a lien, incumbrance, trust, or any other claim, except that of dower, may protect himself by purchasing the title of another *bonâ fide* purchaser without notice; for otherwise such *bonâ fide* purchaser would not enjoy the full benefit of his own unexceptionable title. And if a person who has notice, sells to another who has no notice and is a *bonâ fide* purchaser for a valuable consideration, the title will not be affected with notice in the hands of the latter; for otherwise no man would be safe in any purchase. (See § 409, 410.)

10. Fraudulent dealing with executors or administrators.

10. Purchases from executors, of the personal property of their testator, are ordinarily valid, notwithstanding it may be affected with some peculiar trust or equity

in the hands of the executor; for the purchaser cannot be presumed to know that the sale may not be required in order to discharge the debts of the testator, to which they are legally liable before all other claims. But if the purchaser knows that the executor is converting the estate into money for an unlawful purpose, the purchase will be set aside. (§ 422.)

11. Frauds under the stat. 27 Eliz. c. 4.

11. The object of the Statute 27 Eliz. c. 4, being to give full protection to subsequent purchasers against voluntary prior conveyances, it has been decided, that in consequence of this Statute, all prior conveyances are void, as against subsequent purchasers, whether with or without notice, if such prior conveyances are not on valuable consideration, although they may be *bonâ fide* and on good consideration, on the ground that the Statute, in every such case, infers fraud, and will not suffer the presumption to be rebutted. But, as between the parties themselves, such conveyances are binding. (§ 425, 426.) And as between voluntary conveyances, where each is *bonâ fide*, Equity will not interfere. (§ 433.) Nor will Equity interfere, where the voluntary

grantee has conveyed to a *bonâ fide* purchaser for valuable consideration, without notice, before the *bonâ fide* purchaser from the voluntary grantor acquired his title. (§ 434.)

TITLE II.

OF EXECUTIVE EQUITY.

CHAPTER I.

OF LEGACIES.

No suit will lie, at the Common Law, to recover legacies, unless the executor has assented to them (§ 591); because all the chattels vest in him, and are liable to the payment of the testator's debts, and it is the duty of the executor, before he pays, delivers over, or assents to the legacies, to see whether there will be sufficient left to pay the debts, inasmuch as a man must be just before he is permitted to be generous. (See 2 Blac. Com. 512.) But in cases of specific legacies of chattels, after the executor has assented thereto, the property vests immediately in the legatee, who may maintain an action at Law for the recovery thereof. The same rule has been attempted to be applied at Law to cases of pecuniary legacies, when the executor has expressly assented to such legacies, but the application has been doubted and disapproved of (§ 591); because Courts of Law could not impose on the parties recovering such legacies, such terms as

Jurisdiction.

might be required; so that, for example, a husband might recover a legacy given to his wife, without making any provision for her or her family. (§ 592.) If the legacy is of a chattel personal, or is payable out of personal estate, and the executor has not assented, and the legacy is not the subject of a trust express or implied, the legatee may enforce his claim in the Ecclesiastical Court, if that Court can take due care of the interests of all parties; but the jurisdiction of that Court is very rarely exercised in legatory matters; and, in the case supposed, the Common Law Courts, as already observed, have no jurisdiction; so that, practically speaking, the Courts of Equity have exclusive cognizance of such cases. And where there is an actual trust, express or implied, or the legacy is charged on land, or the other Courts cannot take due care of the interests of all parties, Courts of Equity will assert an exclusive jurisdiction. And even where the executor has assented to the legacy, and there is no actual trust, yet they have jurisdiction, though it may be merely a concurrent jurisdiction; because the executor is considered as a kind of trustee for the legatees, which forms a uni-

versal ground of equitable interference; and because the interposition of a Court of Equity may be required to obtain a discovery, account, or distribution of assets, or some other relief or assistance which the other Courts are incompetent to afford. (See § 593—602.)

Legacy to a married woman.

Thus, if a legacy is given to a married woman, and her husband sues for it in an Ecclesiastical Court, a Court of Equity will grant an injunction; because the Ecclesiastical Court has no authority like that of a Court of Equity, to require him to make a suitable settlement on her and her family. (§ 598.)

Legacy to an infant.

So where legacies are given to infants, Courts of Equity have exclusive jurisdiction; because they can give proper directions for securing and improving the fund, which the Spiritual Courts have no power to do. And indeed it would, in these cases, be proper for the executor to resort to a Court of Equity, to procure suitable indemnity for the payment of the legacy, and security to refund in case of a deficiency of assets. (§ 600.)

Legacy payable at a future day.

So in cases of legacies payable at a future day, whether contingent or otherwise,

Courts of Equity will compel the executor to give security for the payment thereof; or, which is the modern and perhaps the more appropriate practice, it will order the fund to be paid into Court, even if there is not any actual waste or danger of waste. (§ 603.)

Specific legacy to one for life, remainder to another.

And where a specific legacy is given to one for life, and after his death to another, there the legatee in remainder can obtain a decree for security from the tenant for life, for the due delivery over of the legacy to the remainder-man, if there is some allegation and proof of waste or of danger of waste. But, in the present day, if there is no such allegation and proof, the remainder-man is only entitled to have an inventory of the property which was bequeathed to him, so that he may be enabled to identify it, and when his absolute right occurs, to enforce a due delivery of it. (§ 604.)

Construction of legacies.

In deciding on the validity and interpretation of purely personal legacies, Courts of Equity implicitly follow the rules of the Civil Law, as recognized and acted on in the Ecclesiastical Courts; but as to legacies charged on land, they generally follow the rules of the Common Law. (§ 602, 608.)

With these few remarks, we must dismiss the subject of Legacies, as a separate topic, since it is so extensive, that the doctrines of Equity respecting it could not be even succintly stated without far transgressing the limits allotted to the present outline of Equity.

CHAPTER II.

OF DONATIONES MORTIS CAUSA.

Jurisdiction.

COURTS of Equity maintain a concurrent jurisdiction in all cases of this kind, where the assistance afforded at Law is not adequate or complete. (§ 606.)

Definition.

A *donatio mortis causa* is a gift of personal property made by one who is in peril of death, and evidenced by a manual delivery of the property itself, or of the means of obtaining possession of the same, or of the writings by which the property was created, and conditioned to take effect in the event of his never recovering from his existing disorder, or revoking the gift before his death. (See § 606, 607 a—607 c.)

Such donations sometimes enforced as trusts.

The doctrine no longer prevails, that where a delivery, from the nature of the thing delivered, will not execute a complete gift *inter vivos*, it cannot create a *donatio mortis causa*. On the contrary, it is now established that Courts of Equity, in such cases, will treat the delivery of the instrument by which the property was created, as constitut-

ing a trust for the donee to be enforced in Equity. (607 c.) So that negotiable notes, bills of exchange, bonds, and mortgages, may be the subject of such donations; and goods in a warehouse may be given as a *donatio mortis causa*, by a delivery of the key. (§ 607 a.)

Mixed character of such donations.

A donation of this kind partakes partly of the characteristics of a gift *inter vivos*, and partly of those of a legacy. It differs from a legacy in these respects: 1. It takes effect from the delivery in the lifetime of the donor; and therefore it cannot be proved as a testamentary act in the Ecclesiastical Courts. 2. It requires no assent or other act on the part of the executor or administrator to perfect the title of the donee. It differs from a gift *inter vivos* in certain respects in which it resembles a legacy: 1. It is revocable during the donor's lifetime. 2. It may be made to the wife of the donor. 3. It is liable to the debts of the donor on a deficiency of assets. (§ 606 a.)

CHAPTER III.

OF EXPRESS PRIVATE TRUSTS EVIDENCED BY SOME WRITTEN DOCUMENT.

I. Definition of a trust.

I. A TRUST, when used in the sense of an interest, is the equitable or beneficial interest or ownership of or in real or personal estate, existing apart from and collateral to the legal interest or ownership. (See Smith's Executory Interests, annexed to Fearne, § 44—46. 50.)

II. Extent of jurisdiction over trusts.

II. Trusts arising under wills are exclusively within the jurisdiction of Courts of Equity. (§ 1058.) And indeed this is the case with most matters of trust; there being few cases of trust, except bailments, and rights founded in contract, and remediable by an action of *Assumpsit*, and especially by an action for money had and received, in which a remedy can be administered in the Courts of Law. (§ 962.)

III. Division of trusts.

III. Trusts may be divided into three kinds: express trusts, implied trusts, and constructive trusts; though the two last are frequently confounded, or at least classed

together, and sometimes designated by the name of implied trusts, and sometimes by the name of constructive trusts.

IV. Definition of an express trust.

IV. An express trust is a trust which is clearly expressed by the author thereof, or may fairly be collected from a written document.

V. Mode of declaration required by the Statute of Frauds.

V. The Statute of Frauds requires all declarations of trust of lands, tenements, or hereditaments, but not of personal property, to be evidenced by some writing signed by the party declaring the same. (§ 972.)

VI. By what words a trust may be created.

VI. Where uses are expressly and clearly limited, which the Statute of Uses will not execute, that is, convert into legal estates, trusts are thereby created; for modern uses unexecuted by the Statute are trusts, just as all uses were trusts before the Statute was made. And where uses are engrafted on uses, the Statute only executes the first use. Nor does the Statute execute uses or trusts where it is requisite that the trustee should continue to hold the estate in order to perform them. Nor does the Statute extend to uses or trusts in regard to terms for years or to chattels personal. (See § 970.)

In these cases, it is plain that a trust is created. But there are many cases, arising

under wills, in which it is very difficult to determine whether or not a trust is created. It may, however, be laid down as a general rule, that expressions of recommendation, confidence, hope, wish, and desire, are considered to create trusts, if they appear to have been intended to be imperative; and the object and the property which is to form the subject of the supposed trusts, are certain and definite. But if either the object or the subject be not definite; or if a discretion and a choice to act or not is given; or the prior disposition of the property imports an absolute ownership; Courts of Equity will not now create a trust from words of this character. (§ 1069, 1070, and notes.) The family of A. will often be a sufficient designation of the objects; for the context may render it definite, and show that it means the heir at law of A.; or, in other cases, the child of A.; or, in others, the rleations of A. (§ 1071.) But where a testator devised his leasehold estates to his brother A. for ever, "hoping he would continue them in his family," this did not create a trust; for the words gave a choice, and the object was not definite. (§ 1072.) And where a testator bequeathed to his wife all the residue of his

personal estate, "not doubting but that she will dispose of what shall be left at her death to his two grandchildren;" these words did not create a trust, because the property would be uncertain; for it might be just what she chose to leave. (§ 1073.)

VII. Where the words are either directly or indirectly imperative, but the objects are too indefinite, the property will fall into the residue of the testator's estate, as it is clear that the legatee or devisee is not to take for his own use. (§ 1068, note.)

VII. Where a trust fails, because the objects are too indefinite.

VIII. Express trusts are either executed or executory. A trust executed is a trust which is formally and finally declared by the instrument creating it. A trust executory is a trust raised by a stipulation or direction to make a settlement or assurance to uses or upon trusts which do not appear to be formally and finally declared by the instrument containing such stipulation or direction. (Smith's Executory Interests, annexed to Fearne, § 489.)

VIII. Division of express trusts. Definition of a trust executed.

Definition of a trust executory.

IX. Trusts in real property, which are exclusively cognizable in Equity, are generally governed by the same rules as legal estates. But, 1. The construction put upon trusts executory, as we have before seen,

IX. Trusts governed by same rules as legal estates.

Exceptions.

differs from that which prevails in regard to legal estates and trusts executed. 2. Before the late Act of Dower, Courts of Equity held that they were not subject to dower; because, before the question was tried, it was the general opinion that by the creation of a trust estate, dower was prevented from attaching; and it is a maxim that, *communis error facit jus;* and to have held that trust estates were subject to dower, would be to affect a large proportion of the estates in the kingdom. 3. An equitable estate, being incapable of livery of seisin and of every form of conveyance which operates by the Statute of Uses, a mere declaration of trust was held sufficient to transfer such equitable estates; except that a fine or recovery was required where the same would have been necessary had the estate been a legal estate. (See § 974, 974 a, and notes; and as to executory trusts, see p. 20, 21, *supra.*)

X. Trusts of terms.

X. Long terms for years are often created for securing the repayment of money lent on mortgage, and for securing the payment of jointures, and portions for children, and for other trusts. Such terms do not determine on the mere performance of the trusts for which they were created, unless there is a

special provision to that effect; but the legal interest continues in the trustee, after they are performed; and at Law the term continues to be a term in gross, as distinct and separate from the inheritance as it was at first. But in Equity the term may become attendant on the inheritance by express declaration, so as to follow the descent to the heir, and all the alienations made of the inheritance, or of any particular estate or interest carved out of it by deed or by will or by act of Law, and so as not to be devisable, before the late Act, without the formalities requisite for devising real estate, and, in short, so as to be governed in Equity by the same rules generally as the inheritance. But a satisfied term may become attendant on the inheritance by mere implication; for, as Equity always considers who has the right to the land in conscience, if the term is not subject to any ulterior limitation to which the inheritance is not subject, and the owner of the inheritance is entitled to the whole trust of the term, it is attendant on the inheritance by implication.

In consequence of satisfied terms being deemed terms in gross at Law, but capable of being rendered completely subservient

to the ownership of the inheritance in Equity, they are often made of the greatest use in protecting the inheritance from mesne estates, charges, and incumbrances. Thus, if a *bonâ fide* purchaser for valuable consideration, mortgagee, lessee, or other incumbrancer, takes a conveyance, lease, or assignment, defective by reason of some other conveyance, lease, or assignment of the fee or any estate carved out of it, which was made subsequent to the creation of a long satisfied term for years and prior to his own conveyance, lease, or assignment, and of which he had no notice at the time of his contract, he may effectually protect himself against all persons claiming under such prior conveyance, lease, or assignment, by taking an assignment of the satisfied term to a trustee for himself, or by taking an assignment thereof to himself, where he took the conveyance, lease, or assignment of the estate or interest to be protected in the name of a trustee; for he may use the legal estate in such satisfied term, to defend his possession during the continuance of the term; or, if he has lost the possession, to recover it. (See § 998—1001, and notes, and § 1002.)

An attendant term may at any time be disannexed by the proper acts of the parties in interest, and be turned into a term in gross, when it fails of a freehold to support it, or it is divided from the inheritance by different limitations from those of the latter. (§ 1002.)

XI. Trust created without *cestui que trust's* knowledge.

XI. A person in whose favour a trust has been created may affirm it, and enforce the performance thereof, although it was created without his knowledge, if at least it is not revoked by the author of the trust before it is so affirmed. (§ 972.)

XII. What trusts will be enforced.

XII. Equity will not enforce a mere voluntary executory trust raised by a covenant or agreement, except in favour of a wife or child as against a mere volunteer; but it is otherwise where the trust is executed, or where it is raised by will. (See cases referred to § 973, 793. And as to the distinction between executory and executed, see *supra*, p. 93.)

XIII. Execution of marriage articles.

XIII. Marriage articles will be specifically executed on the application of any person within the scope of the consideration of the marriage, or of those claiming under any such person. But they will not be specifically executed on the application of

persons who are volunteers, even of a wife or child by a subsequent marriage; although where the bill is brought by persons who are within the scope of the consideration, or by those claiming under them, Courts of Equity will decree a specific execution throughout, as well in favour of the mere volunteers, as of the plaintiff, as they either execute them *in toto*, or not at all. (§ 986, 987.)

XIV. Assignments for benefit of creditors.

XIV. Preferences and priorities of particular creditors are ordinarily valid, in general assignments made by insolvents and other debtors in discharge of their debts. (§ 1036.)

In order to entitle the creditors named in a general assignment for the benefit of creditors to take under it, it is not necessary that they should be technical parties thereto, unless they are named in the assignment as parties, and are expressly required to execute before they can take under its provisions. It is sufficient if they have notice of the trust in their favour, and assent to it; and if there is no stipulation for a release or any other condition in it which may not be for their benefit, their assent will be presumed, till the contrary appears. (§ 1036 a.) Until, however, the creditors have assented

to the trust, and given notice thereof to the assignee, an assignment of this kind in which the creditors are not parties and have not executed, is deemed revocable by the debtors, in Equity as well as at Law, whether the creditors are individually named or not. (§ 1036 b.)

XV. Revocableness of a consignment or remittance.

XV. Indeed, in every case where a consignment or remittance is made, with orders to pay over the proceeds to a third person, the appropriation is not absolute, but revocable at any time before the third person has assented thereto, and notice of the same has been given to the mandatory; for it amounts to no more than a mandate from a principal to his agent. But after such assignment and notice, the third person may avail himself of it in Equity, without any reference to the assent or dissent of the mandatory, for his receipt of the property binds him to follow the order of his principal. (§ 1045, 1046.)

XVI. Obligation of purchaser to see to the application of the purchase money.—General rules.

XVI. Where property is devised to be sold for, or is charged with, the payment of definite and ascertained sums only, and such payment is to take place at the time when the required amount is to be raised, the purchaser of such property is bound to see

that the purchase money is applied in the fulfilment of the trust, unless expressly exempted by a provision by the author of the trust. But where the property sold is liable to the payment of debts generally, under an express charge, or otherwise, and therefore, in order to ascertain the sums to the payment of which the property is liable, it would be necessary for the purchaser to file a bill, or where the purchaser, if bound to see to the application of the money, would be involved in a trust of long continuance; there, the purchaser, unless he has notice that there are no debts, or notice of fraud, is not bound to see to the application of the purchase money. (See § 1127, 1126, 1128, 1130—1134.)

Specific points in illustration of the above rules as to the purchaser's obligation.

In illustration of these rules, it may be observed, that as the personal estate is liable at the Common Law for the payment of the debts of the testator generally, the purchaser of the whole or of any part of it, without notice that there are no debts, is not bound to see that the purchase money is applied by the executors in the discharge of the debts, (§ 1126,) even if the testator has directed his real estate to be sold for payment of debts, whether specified or not,

and has made a specific bequest of a part of his personal estate for a particular purpose, or to a particular person, although such specific bequest is known to the purchaser, if he has no reason to suspect any fraudulent purpose; for, otherwise, before a person could become a purchaser of personal estate specifically bequeathed, it would be indispensable for him to come into a Court of Equity to have an account taken of the assets of the testator, and of the debts due from him, and whether it was necessary for the executor to sell. (§ 1129.)

The same rule, for the same reason, applies to real estate devised for or charged with the payment of debts generally (§ 1130); even though the trust is only to sell, or is a charge for, so much as the personal estate is deficient to pay the debts, and even though a specific part of the real estate is devised for a particular purpose or trust, if the whole real estate is charged with the payment of debts generally by the will. If, however, the trustee has only a power to sell, and not an estate devised to him, then, unless the personal estate be deficient, the power to sell does not arise. (§ 1131.)

Where, in cases of real estate, the trust is for the payment of legacies only, or of specified or scheduled debts alone, the rule is different; for they are ascertained, and the purchaser may see that the money is applied in discharge of them. But where the devise is for payment of debts generally, and also for the payment of legacies, the purchaser is not bound to see to the application of the purchase money; because, to hold him liable to see the legacies paid, would in fact involve him in the necessity of taking an account of all the debts and assets. (§ 1132.)

Where the time appointed by the devise for a sale of real estate is arrived, and the persons entitled to the money are infants or unborn; there, the purchaser is not bound to see to the application of the purchase money; because that might involve him in a trust of long continuance. But if an estate is charged with a sum of money payable to an infant at his majority, the purchaser is bound to see the money duly paid on his coming of age; for the estate will remain chargeable with it in his hands. (§ 1133.)

Where the money is to be applied by the trustees to certain purposes which require, on their part, time, delay, and discretion, it seems the purchaser is not bound to see to the application of the purchase money. (§ 1134.)

CHAPTER IV.

OF EXPRESS CHARITABLE TRUSTS.

I. Jurisdiction.

I. WHERE the objects of a disposition for charity are clearly defined, and are *in esse*, and the property given for the purpose is vested in trustees, who are *in esse*, the Court of Chancery enforces the charity by virtue of its general jurisdiction over trusts. (§ 1187.) But where the author of the charitable disposition does not interpose any trust, or no trustees are *in esse* and capable of taking, or the charity is of an indefinite nature, the jurisdiction exercised by the Chancellor is not referrible to the general jurisdiction of the Court, as a Court of Equity, but to the authority given to the Chancellor as a personal delegate under the Statute of Charitable Uses, 43 Eliz. c. 4, or to his authority as special delegate of the Sovereign, who, as *parens patriæ*, has a right to guard and enforce all charities of a public nature, or to the authority of the Sovereign, acting under his sign manual, through his Chancellor, guiding his discre-

tion. The jurisdictions are often confounded in practice, and it is frequently difficult to distinguish in what capacity the Chancellor acts or ought to act. (See § 1142—1162, 1187—1191.) But it is now the settled rule that where there is a general indefinite purpose of charity not fixed on any particular object, the disposition and administration of it are in the Crown by the sign manual. But where the gift is to trustees with general objects, or with some particular objects pointed out, there the Court of Chancery will take on itself the administration of the charity, and execute it under a scheme to be reported by a Master. (§ 1190.) The jurisdiction of Chancery, however, over charities, does not exist where there are local visitors appointed; for it then belongs to them and their heirs to visit and control the charity. (§ 1163.)

II. General rules as to definiteness of the objects.

II. If a bequest is made in the most general and indefinite manner simply for charitable uses, *eo nomine*, the Court of Chancery will treat it as a valid charitable bequest, and will dispose of it for such charitable purposes as it shall think fit. But where the bequest may, in conformity to the express words of the will, be disposed of in

charity of a private nature, or be employed for general benevolent or useful purposes, or for any general purpose similar to but other than simply charitable purposes, *eo nomine;* the bequest will be void, and the property will go to the next of kin. For, private charity cannot be controlled or executed by the Court of Chancery; and when property is left for indefinite benevolent or useful purposes, other than charitable purposes, *eo nomine*, the bequest savours too much of discretionary private charity or liberality, to be enforced by the Court of Chancery.

Illustrations.

Hence it has been held, that if a man devises a sum of money to such charitable uses as he shall direct by a codicil annexed to his will or by a note in writing, and he leaves no direction by note or codicil, the Court of Chancery will dispose of it to such charitable purposes as it shall think fit. (§ 1167.) But directions to give money in private charity have been held inoperative. (§ 1157, 1183.) And a bequest for such benevolent, religious and charitable purposes, or for such charitable or public purposes as the trustees should in their discretion think most beneficial, is void, on the ground of being too general and indefinite

to be executed in Chancery, and the Court will distribute the property among the next of kin. (§ 1156—1158, 1160, 1161, 1164, 1183.)

III. Charities are so highly favoured in the Law, that they have always received a more liberal construction than the Law will allow in gifts to individuals. (§ 1165.) So that if a testator makes a bequest for charity to such persons as he shall afterwards name executors, or to such persons as his executors shall name, and he appoints no executors, or the executors die in the lifetime of the testator, and no others are appointed; or if the trustees of a charitable legacy all die in the testator's lifetime; or if a corporation entrusted with a charity fails; the Court of Chancery will execute the charity. (§ 1165—1166, 1177.) So if a legacy is given to persons who have no legal corporate capacity to enable them to take as a corporation; as where a legacy is given to the churchwardens for a charitable purpose. (§ 1169, 1170.) And the Court of Chancery will supply all defects in conveyances, where the vendor is capable of conveying, and has a disposable estate, and the mode of conveyance does not contravene

III. Charities favoured

in regard to the want of proper trustees;

in regard to defects;

in regard to the objects;

the provisions of any Statute. (§ 1171.) And where the party has specified any particular object, and that object is contrary to the policy of the Law, or, from some other reason, cannot be accomplished at all, or not in the way prescribed, the Court will devote the property to some other charitable purpose, if the nature of the gift, or the concurrence of other charitable gifts in the same instrument, indicates that although the specified object was the favourite yet it was not the exclusive object of the giver, but that he would have substituted some other charitable object, had he imagined that his favourite design might possibly be incapable of being accomplished. But where no such indication appears, (as where the testator's object is to build a church at W., and that cannot be effected,) the next of kin will take. (See § 1167, 1168, 1172, 1176, 1181, 1182.) Where there are no objects *in esse*, but some may arise, the Court will keep the fund for them. And when there can be no such objects as those which are specified, or when the specified objects cease to exist, the Court will remodel the charity. (§ 1169, 1170, 1170 a, 1176.) And when the increased revenues of a charity

in regard to increase of revenue;

are more than sufficient for the specified objects of charity, the surplus will not go to the heir at law or next of kin of the founder, but will be applied to similar charitable purposes, and to the augmentation of the benefits of the charity. (§ 1178, 1181.) And, to give another instance of the favour shown to charity, lapse of time is no bar in the case of charitable trusts. (§ 1192 a.)

In regard to lapse of time.

IV. Where money is bequeathed to charitable purposes abroad, the Court of Chancery will secure the fund, and cause the charity to be administered under its own direction, provided the charitable purposes are to be executed by persons residing within the jurisdiction of the Court. (§ 1186, 1300.) But this will not be done, if the objects of the charity are against the public policy or Law of the state where the Court of Equity sits, unless the principle of such policy or Law is of a local or conventional, rather than of a universal and moral or religious character. (See § 1185.)

IV. Charities abroad.

V. It seems, that with a view to encourage the discovery of charitable donations given for indefinite purposes, it is the practice for

V. Reward to informers.

the Crown to reward the persons who made the communication, if they can bring themselves within the scope of the charity, by giving them a part of the fund; and the like practice takes place also in relation to escheats. (§ 1192.)

CHAPTER V.

OF IMPLIED TRUSTS.

An implied trust is a trust which is founded in the unexpressed but presumable intention of a party. (See § 1195, 1254.) Definition.

I. Where trusts fail, either entirely or partially, by reason of the failure of the intended objects or purposes, or of the illegality or indefinite nature of the trust, or otherwise; or where the trusts are fully and finally fulfilled, without exhausting all the property out of which they were to be fulfilled, there will be a resulting trust of such property, or of so much thereof as remains unexhausted, to the party creating the trust, or to his heir or legal representatives, unless there is sufficient evidence or presumption of a contrary intention. (§ 1196 a, 1200, and note.) I. Where trusts fail, or the property is unexhausted by the trust.

II. An implied resulting trust also arises where a conveyance is made of land or other property, without any consideration, express or implied, real or nominal, and without any distinct use or trust stated. (§ 1197, 1199.) II. Conveyance without consideration, and without use or trust.

III. Limitation of a particular interest only.

III. Where a person parts with or limits a particular estate only, and leaves the residue undisposed of, the residue results to him, even though there may be a consideration. (§ 1199.)

IV. Undisposed of residue of testator's personal estate.

IV. Before the Statute 1 Will. IV. c. 40, where a testator made no express disposition of the residue of his personal estate, the executor was by Law entitled to such residue; and Courts of Equity, as the Act recites, so far followed the Law, as to hold such executors to be entitled to retain such residue for their own use, unless it appeared to have been the testator's intention to exclude them from the beneficial interest therein; in which case they were held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions, if the testator had died intestate. And Equity laid hold of any circumstance or expression in the will, which might appear to rebut the presumption of a gift to the executor, and convert him into a trustee for those on whom the Law would have cast the surplus in case of a complete intestacy. (See § 1208 and note.) The Statute furthers the views of Courts of Equity, in narrowing the application of the

rule of Law by enacting, as to wills made by persons who should die after the first day of September, 1830, that the executor should be deemed by Courts of Equity to be a trustee for the persons (if any) who would be entitled under the Statute of Distributions in respect of any residue not expressly disposed of, unless it should appear by the will, or a codicil thereto, that the executors were intended to take such residue beneficially.

V. Where a testator devises an estate in trust to pay debts and other charges, no beneficial interest passes to the devisee, but he is a mere trustee for the payment of debts and charges, and, as to the residue, after payment of debts, a trustee for the heir. But where an estate is devised, charged with or subject to debts and other charges, the whole beneficial interest passes to the devisee, subject only to the payment of the debts and other charges. (§ 1245.)

V. Devise in trust to pay debts and charges.

Devise charged with or subject to debts and charges.

VI. Where a person buys freehold, copyhold, or leasehold lands, and pays the purchase money for it, but takes the conveyance or assignment exclusively in the name of another or others, whether jointly or successively, the trust of the legal estate

VI. Conveyance or assignment in another's name.

will result to the person who advanced the purchase money; for it is presumed that the real purchaser intended the purchase to be for his own benefit, and took it in the name of another merely to answer some collateral purpose. The same doctrine is applied to securities taken in the name of a third person. (§ 1201.) And proof of the payment of the purchase money by the real purchaser may be furnished either by the language of the deed itself, or by some memorandum or note of the nominal purchaser, or by his answer to a bill of discovery, or by papers left by him and discovered after his death. (§ 1201, note.)

and securities in another's name.

Proof of the payment of the purchase money by the real purchaser.

No resulting trust will be raised, where a contrary intention, unrebutted by other evidence or grounds of presumption, is indicated by the terms or the object and purpose of the instrument creating the trust, or is established by parol evidence, or may be presumed from the relation between the parties. (§ 1196 a, note, and § 1202.) And hence, in general, there will be no resulting trust where a purchase is made or a security is taken in the name of a wife or child who is unprovided for; because it will be presumed that it was intended as an ad-

Where resulting trust is rebutted;

as where a purchase or security is taken in the name of a wife or child.

vancement and provision, in discharge of a moral obligation, and as a token of affection, unless there are circumstances which furnish a strong presumption of a contrary intention. (§ 1202—1205, and note.)

VII. Limitations which confer an estate in joint-tenancy at Law will have the same effect in Equity, when there are no circumstances which afford grounds for a departure from the rule of Law. But as joint-tenancy is not favoured in Equity, Courts of Equity will lay hold of any circumstances which will enable them to vary in these respects from their practice of following the Law. Thus, if two persons advance a sum of money by way of mortgage, and take a mortgage to them jointly, and one of them dies, his representatives will be entitled to his proportion as a trust. So if two persons jointly purchase an estate, and pay unequal proportions of the purchase money, and take the conveyances in their joint names; in case of the death of either of them, there will be no survivorship, but they will be deemed to be purchasers in the nature of partners, and to have intended to hold the estate in proportion to the sum which each advanced. (§ 1206.) And where real estate

VII. Limitations which would create a joint-tenancy at Law.

Joint mortgage.

Joint purchase.

is purchased for partnership property, and on partnership account, the legal estate, in whomsoever it may be vested, is in Equity deemed to be partnership property, not subject to survivorship. (§ 1207.)

VIII. Covenant to purchase lands.

VIII. And where a person has covenanted to lay out money in the purchase of land, or to pay money to trustees to be laid out in the purchase of land, if he afterwards purchases land to that amount, they will be affected with an implied trust; for, unless the contrary clearly appears, it will be presumed that he purchased in fulfilment of his covenant (§ 1210); because we are bound to put the most favourable construction on a person's acts.

IX. Covenant to settle lands.

IX. It is a general rule, that if a settlor covenant to convey and settle lands, without specifying any in particular, such covenant shall not constitute a specific lien on his lands, and the covenantee will be deemed a creditor by specialty only (§ 1249); for he may have intended to purchase land for the purpose, instead of settling any part of the land he then had.

CHAPTER VI.

OF CONSTRUCTIVE TRUSTS.

Implied and constructive trusts often confounded.

IMPLIED trusts and constructive trusts, as already observed, are frequently confounded or classed together; and the same trusts are sometimes designated by the name of implied trusts, and at other times by that of constructive trusts.

Definition of a constructive trust.

But a constructive trust, as distinguished both from express and from implied trusts, may be defined to be a trust which is raised by construction of Equity, in order to satisfy the demands of justice, without reference to any presumable intention of the parties. (See § 1195, 1254.)

I. Repairs or improvements.

I. A constructive trust arises where a person who is lawfully in possession under a defeasible title, or one who is only tenant for life, or joint owner, acting *bonâ fide*, permanently benefits an estate by repairs or improvements; for a lien or a trust arises in his favour, in respect of the sum he has expended in such repairs or improvements; especially in cases where the real owner,

remainder-man, reversioner, or joint owner, who ought to pay or contribute to the expenses so incurred, comes into Equity for any relief against the party who has made such repairs or improvements; in which cases the maxim is applied, that he who seeks for Equity must himself do Equity. (See § 1234, 1236, 1237.)

II. Payment of legatees or distributees before creditors.

II. So where executors, by mistake, but *bonâ fide*, and without fault, have paid legatees or distributees before a due discharge of all the debts, the latter are treated as trustees for the purpose of paying the debts; because they are not entitled to anything except the surplus of the assets, after all the debts are paid. (§ 1251.)

III. Covenant or agreement to convey, transfer, or pay money or other property.

III. Where a person is under a covenant or agreement, for valuable consideration, to convey, transfer, or pay money or other property to or for the use or benefit of another, a constructive trust arises in favour of the latter against the former, and his representatives, and those claiming under him as volunteers, or with notice of the covenant or agreement; because, where things are covenanted or agreed to be done, Equity treats them, for many purposes, as if they were done. (See § 1212, 1231.)

Nature of, and reasons for, the vendor's lien.

Thus a constructive trust arises when the purchase money of an estate is not paid. In such case the vendor has a lien on the property in Equity; that is, a hold upon it for the satisfaction of the purchase money; and, to the extent of the lien, the purchaser becomes a trustee for the vendor. (See § 1215, 1217, 1220.) And although, in some cases, it is reasonable to presume a tacit consent or agreement that the vendor should have such a lien, yet the lien is not strictly attributable to such a consent or agreement, but is founded on the most obvious principles of natural justice. (See § 1219, 1220.)

Where it originally exists.

In general, the vendor has such a lien; and the burden of proof is on the purchaser, to establish, that, in the particular case, it has been intentionally displaced or waived by the consent of the party. (§ 1224.) If, on the face of the conveyance, the consideration is expressed to be paid, and even if a receipt for it is endorsed on the back of it, and yet the money has not actually been paid, the vendor has a lien. (§ 1225.) And if a security has been taken for the money, the burden of the proof has been adjudged to lie on the vendor, to show that the vendor agreed to rest on the security and to dis-

charge the land, or, at most, the taking of a security has been deemed to be no more than a presumption, under some circumstances, of an intentional waiver of the lien, and not as conclusive of the waiver. (§ 1226.)

Continuance thereof.

When the vendor has a lien against the vendee, it continues, notwithstanding any devolution or transfer of the estate, except where it is extinguished by the countervailing Equity of a *bonâ fide* purchaser for valuable consideration without notice, when clothed with the legal title.

Against whom it exists.

So that it exists against the vendee and his heir, and against volunteers claiming under him; against purchasers under him, with notice that he had not paid the purchase money; against purchasers having an equitable title only; against assignees claiming by a general assignment under the bankrupt and insolvent Law; against assignees claiming under a general assignment made by a failing debtor for the benefit of creditors; and against a judgment creditor of the vendee, at least before an actual conveyance of the estate has been made to him. (See § 1228.) For, in each of these cases, (except that of the *bonâ fide* purchaser for

valuable consideration without notice, who has only an equitable title) the party in possession has obviously no more equity against the lien of the vendor, than the vendee himself had, but clearly stands in the same situation and subject to the same equity. And although the *bonâ fide* purchaser without notice, who had only an equitable title, has an equity quite distinct from that of his vendor, the first vendee, yet the equity of such purchaser to retain what he has paid for, is only equal to that of the first vendor to be paid for that which he has parted with; and when the equities are equal, and neither of the parties has the support of the legal title, the maxim applies, *qui prior est in tempore potior est in jure.*

But the lien will not prevail against a *bonâ fide* purchaser for valuable consideration from the vendee, where such purchaser has paid his purchase money, and taken a conveyance of the legal estate, and had no notice, at the time of paying his money, that such vendee had not paid the purchase money (§ 1228, 1229); because, having given a valuable consideration for the estate, without notice, he has as much equity to

retain what he has so paid for, as the original vendor has to be paid for that which he has parted with; and having this equal equity, the Court will not take from him the legal title with which he has clothed himself, according to the maxim, that where the equities are equal, the law shall prevail; so that, in this case, the vendor's lien is virtually extinguished by the countervailing equity of the purchaser from the vendee.

IV. Property acquired, or profits made, by persons in a fiduciary relation.

IV. If a trustee, or other person standing in a fiduciary relation, acquires property, or makes a profit by means of transactions within the scope of his agency or authority, there will be a constructive trust, as to the property so acquired or the profits so made, for the benefit of the *cestui que trust*, principal, or other party standing in the opposite relation. (See § 1211, 1211 a, 1261.) So that, if a trustee should purchase a lien or mortgage on a trust estate at a discount, he would not be allowed the benefit of the difference, but the purchaser would be a trustee for the *cestui que trust*. So, if a trustee should renew a lease of the trust estate, he would be bound to account to the *cestui que trust* for all advantages made

thereby. (§ 1211.) So if an agent who is employed to purchase for another, purchases in his own name, or on his own account, he will be held to be a trustee for the principal, at the option of the latter. (§ 1211 a.)

V. Wrongful conversion of property.

V. Whenever property of one kind has been wrongfully converted into property of another kind, by a trustee or agent, if the property which has been so substituted can be ascertained to be such, it will be liable to the rights of the principal or *cestui que trust*, to which the property converted was subject. (See § 1258.)

The right of the principal or *cestui que trust* ceases only when the means of ascertainment fail; which of course is the case when the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description. (§ 1259.) But in cases of this sort, the *cestui que trust* or beneficiary is not at all bound by the act of the other party. He has an option to insist on having that into which the trust property has been converted, or to disclaim any title thereto, and proceed on any other remedy to which he is entitled, either *in rem*, or *in personam*. (§ 1262.) But he cannot insist on repugnant

claims: so that, in the case of a sale of stock by a trustee or executor, in violation of his trust, the party beneficially entitled might either oblige the trustee or executor to replace the stock, or he might affirm his conduct, and take the sum at which he had sold it, with interest and any further profits he might have made by the sale; but the party beneficially entitled could not insist on having the stock replaced, and having the interest instead of the dividends, or on taking the money, and having the dividends as if the stock had remained. (§ 1263.)

VI. Where a trustee sells trust property,

VI. If the trustee conveys the trust property to a *bonâ fide* purchaser for valuable consideration, who has paid his purchase money, and had no notice of the trust at the time of paying the same, the trust is extinguished. But if the trustee should afterwards repurchase or otherwise become entitled to the same property, the trust would be revived by construction of Equity. (See § 1264, and note.)

and then purchases it, or becomes entitled to it again.

CHAPTER VII.

OF TRUSTEES AND OTHERS STANDING IN A FIDUCIARY RELATION.

I. Equity never wants a trustee.

I. It is a rule in Equity, which admits of no exception, that where a trust exists, a Court of Equity never wants a trustee. For, wherever a trust has once attached, whether it is an express, or an implied, or a constructive trust, and it is not extinguished by the countervailing equity of a *bonâ fide* purchaser for valuable consideration, without notice, or other person having a conflicting equity, nor has otherwise ceased to subsist, Equity will follow the legal estate, and decree the person in whom it is vested to execute the trust. (See § 976.)

II. Trustees, &c. are not entitled to remuneration.

II. A trustee or executor is not entitled to any remuneration for his services, without some express or implied provision for that purpose. (§ 1268.)

III. What care and diligence they are bound to use.

III. For this reason, he would seem, by analogy to the case of a gratuitous bailee, to be liable only for gross negligence. (§ 1268.) On the other hand, it might appear that in *Primâ facie* view of the

decisions on the subject.

practice, Courts of Equity have in many cases required extreme circumspection and vigilance, while, in others, they have been satisfied with a less degree of care. (§ 1272, 1273.)

True state of the case.

But the true state of the case seems to be this; that there are certain things which either clearly appear in themselves to be duties, or are established as such by the uniform policy of Courts of Equity; and to these, the Courts require a rigid adherence. But in regard to other points, the trustee is only required to use customary care and diligence; that which is usually exercised by men of ordinary prudence and vigilance in the management of their own affairs.

Omission to sell.

Thus, if a trustee omits to sell property when it ought to be sold, and it is afterwards lost, although without any fault of his, he is liable; because the loss, though not directly occasioned by his default, would never have happened had he not failed in performing what must have appeared a palpable, though perhaps not an urgent duty. (See § 1269, note.)

Improper investment.

Again, Courts of Equity are in the habit of directing property in their own possession to be invested on real security or in the 3 per

cents.; and it has become an established duty, on the part of trustees, to invest on such security or in those funds. And this rule, like an Act of Parliament, or any other kind of Law, is supposed to be well-known, and no one is allowed to plead ignorance of it. If therefore a trustee invests, or even suffers money previously invested to remain, on unauthorized security, however unexceptionable it might seem to be, and such security afterwards fails, he will be liable; as also he will for the fluctuations of any unauthorized fund. (See § 1269, note, § 1273, 1274, note.)

Omission of one trustee or executor to see that the property is duly secured or applied.

Again, where there are two or more trustees or executors, it is the duty of each trustee and executor to see that the property is duly secured or rightly applied, as the case may be. And, therefore, if by the act, direction, agreement, or consent of one of them, the trust fund is paid over to the other, even though it was so paid over in order to be applied by the receiver for those purposes for which it was properly applicable, and the receiver wastes or misapplies it, each will be answerable for the whole; except in the case of money remitted to a co-trustee or co-executor, to be paid by

him in his neighbourhood, where the trustee or executor remitting the same, in case it had been his own money, would naturally have remitted it to some one to pay it away, instead of undertaking a journey for the purpose of paying it himself. (§ 1281, note, and § 1284, and note.) So if one trustee should improperly suffer the other to detain the trust money a long time in his own hands, without security, or should lend it to the other, or should join or acquiesce in a loan of it to any one else, on insufficient security; each will be liable for the whole loss which may happen. And so if it is mutually agreed between them, that one shall have the exclusive management of one part of the trust property, and the other trustee of the other part, each will be liable for any loss which may happen, even to the part of which the other has the management (§ 1274, 1284); because the party not acting was in default for giving the other the power, and exposing him to the temptation, to commit a breach of trust, instead of exercising that control over the property which it was his duty to exercise for the protection and due management thereof.

Losses without want of

On the other hand, if a trustee or other

person standing in a fiduciary relation has not failed in doing what must have appeared to be a palpable duty, and has invested the property on authorized security, he will not be answerable for losses which happen without any want of customary care or diligence on his part. (See § 1269, note, § 1274, note, and 465.) So that if he should deposit the money with a banker in good credit, to be remitted to the proper person by a bill drawn by a person in due credit, and the banker or drawer of the bill should become bankrupt, he would not be responsible. (§ 1269.)

customary care or diligence.

IV. It is the wise policy of Courts of Equity to guard against a breach of trust by prohibiting all acts which may unnecessarily place the trustee in a situation of temptation.

IV. Equity guards against a breach of trust.

Hence, in all cases in which a trustee places trust money in the hands of a banker, he should take care to keep it separate from his own. For, if he should mix it with his own in a common account, he would be deemed to have treated the whole as his own, and would be held liable to the *cestui que trust* for any loss sustained by the banker's insolvency. (§ 1270.)

Trustee may not mix the trust money with his own.

For, if the trustee were at liberty to mix the trust money with his own, he would often be tempted to use it as his own; and frequently, indeed, he would not know whether the money with which he was carrying on his affairs, was his own or not. In this way, he would naturally be led to expend the trust money on his own account, and loss to the trust property would frequently be occasioned, even without any design to commit a breach of trust.

V. Trustee is accountable for interest and gains.

V. A trustee or other person standing in a fiduciary relation is accountable for all the interest which he ought to have made, and would have made, by an investment of the property on the security directed by the instrument creating the trust, or on the security authorized by the general rule of the Court in the absence of any such direction as to the mode of investment. And he will also be accountable for any interest and gains beyond the amount of such interest as above mentioned, which he has actually made on, or with, or in regard to, the trust property, whether in the ordinary discharge of his duty, or in transactions entered into for his own benefit, as he supposed, or otherwise; if the amount

of such extra interest and gains can be ascertained. (See § 465, 1277, 1278, 1211, 1261, 1269, note.) Or, under extraordinary circumstances, the Court will direct annual or half-yearly rests to be made, so as to give the *cestui que trust* the benefit of compound interest: as, if a trustee, in manifest violation of his trust, has applied the trust fund to his own benefit and profit in trade, or has conducted himself fraudulently, or has wilfully refused to follow the positive directions of the instrument creating the trust, as to the investment of the property. (§ 1277.)

VI. Responsibility for each other's acts and defaults.

VI. A trustee (as in certain cases we have already noticed) is responsible for his own acts and defaults, and for those wrongful acts and defaults of his co-trustees, to which he is privy, and in which he expressly, tacitly, or virtually acquiesces. And the same rule applies to executors and other persons standing in a fiduciary relation. But trustees and others standing in a fiduciary relation, are not otherwise responsible for the acts or defaults of each other.

Distinction between trustees and executors in regard to the effect of joining in receipts.

There is, however, an important distinction in connexion with this point, between the case of mere executors and the case of trustees; which, nevertheless, does not

militate against the application of the above-stated rule both to trustees and executors, but is founded in the different power with which they are legally invested, and amounts only to this; that a particular circumstance which would afford a presumption of an act involving responsibility, in the case of an executor, will not afford any presumption of such act, in the case of a trustee.

Thus, trustees have all equal interest, power, and authority, and must all join both in conveyances and receipts; and yet it would be impracticable in some cases, and expensive and inconvenient in others, to require that all should together actually receive the trust money from the party by whom the same might be paid. Hence it cannot be inferred from a trustee's joining in a receipt, that he has received any part of the money; and therefore, although trustees, who are authorized to sell land and receive money, jointly give a receipt, each will ordinarily be liable only for so much of the money as he has received.

But where there are co-executors, each has a several right to receive the debts due to the estate, and all other assets, and is

competent to give a valid discharge by his own separate receipt; and therefore, if they join in a receipt, it is purely a voluntary act, and it will be presumed that they jointly received the money.

In each case, however, the same rules apply; although, in the one case, the party, being a trustee, is not presumed to have done the act which would make him responsible, namely, the act of receiving the money; because the act done by him is as likely to have been a mere formal act, as not: whereas, in the other case, the party, being an executor, is presumed to have done the act involving responsibility; because he has done that which an executor who has not actually received the money, is not called upon to do. (As to these passages respecting acts and defaults for which a trustee or other person standing in a fiduciary relation is responsible, see § 1280, 1280 a, and note.)

VII. Joint breach of trust.

VII. Where trustees are jointly implicated in a breach of trust, all of them should, if possible, be brought before the Court, and should be made to contribute proportionably. (See Observations of L. C. B. Richards *in re Chertsey Market*, 6 Price,

278. But see *contra*, *ex parte Angle*, Barn. 425.)

But each of the trustees who are jointly implicated in a breach of trust, is responsible for the entire loss, and liable to make it good (as in certain cases we have already noticed); so that the *cestui que trust* may, in case of need, proceed against any or either of them singly or separately, even against the less guilty. (See *Walker* v. *Symonds*, 3 Swans. 75—78; *Bradwell* v. *Catchpole*, ib. 78, note.) And in such case, the trustee or trustees who may be so singly or separately compelled to make good the loss, may seek contribution from the others or other of them in another suit. (See Lord Eldon's judgment in *Walker* v. *Symonds*, 3 Swans. 76—78.) This doctrine of the right to contribution would seem founded in a proper policy of Courts of Equity, that all may be visited certainly and equally, and without multiplicity of suits, for the misconduct in which they all participated; and not, it is conceived, in any regard for those who were sued first, unless they were culpable in a very slight degree; for the trustees have no equity against each other in such a case. But perhaps the doctrine in

question may be doubted, on the ground that trustees would be more deterred from committing or conniving at a breach of trust by the consideration that any one of them would be compellable, and might happen to be compelled, to make good the entire loss, than by the certainty that all must suffer, but that the loss would be apportioned between or among them. To this, however, it may be replied, that if the trustees could only be sued by the *cestui que trust*, and were not mutually compellable to contribute, either in the suit brought by the *cestui que trust* in respect of the breach of trust, or in another suit, any one of the trustees might hope that if he were to offer the *cestui que trust* a sum of money, the latter would be induced to spare him and proceed against the others or other alone, as the *cestui que trust* would in that case pocket the sum so offered him, and yet have his remedy for the breach of trust against the other trustee or trustees; or, if a trustee were known to be in low circumstances, or if he were related to the *cestui que trust*, he would naturally think that the *cestui que trust* would either sue the other trustees or trustee alone, or pursue his remedy against all, and certainly not

against such first-mentioned trustee singly. But even supposing that a trustee would be likely to be deterred from committing or conniving a breach of trust, more by the chance of being obliged to bear the whole loss, though there was, for the reasons above given as well as others, a co-existing and perhaps a greater chance that he would escape altogether, than by the certainty that he must bear a part; yet, it is more consonant to justice to take care that all who have been implicated in the wrongful transaction, should certainly suffer, than to act upon calculations of the probability of deterring trustees from such misconduct, which must be as necessarily uncertain, and may be as practically fallacious, as the characters and circumstances of trustees in different cases are manifold and various.

VIII. Trustees to support contingent remainders.

VIII. Trustees to support contingent remainders are peculiarly considered as honorary trustees for the benefit of the family, and as entitled to exercise a discretion for that purpose; and a Court of Equity ought not to punish them for joining in any conveyance without the order of the Court, where they may have been of opinion that the interests of the family required it. The

effect of such a doctrine would be to make the Courts of Equity the trustees of all the estates in the kingdom. (§ 996.) When, therefore, trustees to support contingent remainders have joined in a recovery, after the first tenant in tail has attained his majority, no judge in Equity has gone the length of holding that he would punish them as for a breach of trust, even in a case where a Court of Equity would not have directed them to join. Where, however, before the first tenant in tail is of age, trustees join in destroying the remainders, they are liable for a breach of trust; and so is every purchaser under them, with notice. (§ 997.) In some few cases, Courts of Equity have even compelled such trustees to join in conveyances which may affect or destroy such remainders, under peculiar circumstances of pressure to discharge incumbrances prior to the settlement; or in favour of creditors, where the settlement was voluntary; or for the advantage of persons who were the first objects of the settlement; as, for example, to enable the first son to make a settlement on an advantageous marriage. (§ 995.)

IX. Acquiescence in a

IX. If the *cestui que trust* has for a long

breach of trust.

time acquiesced in the misconduct of the trustee, with full knowledge of it, a Court of Equity will not relieve him; for, *vigilantibus, non dormientibus, æquitas subvenit.* (§ 1284 a.)

X. Debt by breach of trust is a simple contract debt.

X. The debt created by a breach of trust is only regarded as a simple contract debt, both at Law and in Equity, although the trust arises under a deed executed by the trustees; unless the trustee who committed such breach of trust, has acknowledged the debt under seal. (§ 1285, 1286.)

XI. Power of trustee to bind the estate by a sale, &c.

XI. A trustee may bind the estate by a conveyance to a *bonâ fide* purchaser who had no notice at the time of paying his purchase money (§ 1264, and note); because, in that case, as we have seen, the trust is virtually extinguished by the countervailing equity of the *bonâ fide* purchaser. And the trustee may also bind the estate by a *bonâ fide* mortgage, or other specific lien, without notice of the trust. But the trust property will not be bound by any judgment or other claim of creditors against the trustee. (§ 977.)

Sales or pledges by an executor.

"Every person who acquires personal assets by a breach of trust or a *devastavit* by an executor, is responsible to those who

are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust by buying, or receiving as a pledge, for money advanced to the executor at the time, any part of the personal assets, even knowing them to be such, whether specifically given by the will or otherwise; because the sale or pledge is held to be *primâ facie* consistent with the duty of an executor. Generally speaking, he does become a party to the breach of trust by buying, or receiving in pledge, any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt; because this sale or pledging is *primâ facie* inconsistent with the duty of an executor." (Per Sir John Leach, in *Keane* v. *Roberts*, 4 Mad. 357, cited § 580.)

XII. Courts of Equity will assist the trustees, and protect them in the due performance of the trust, whenever they ask the aid and direction of the Court, as to the establishment, the management, or the execution of it. (§ 961.) And in all cases of difficulty, it is best to ask for the direction of the Court. (§ 1276, note.)

XII. Equity will aid and direct trustees.

XIII. Where trustees are guilty of gross

XIII. Equity will remove

trustees, and appoint others.

negligence, mismanagement, or misconduct, or, from any cause, there is a failure of trustees qualified and willing to act, new trustees will be substituted by the Court. (§ 1287, 1289.) And it has even removed a joint trustee from a trust who wished to continue in it, on the mere ground that the other trustees would not act with him; because if he were not removed, irreparable mischief might happen to the trust property or the *cestui que trust.* (§ 1288.)

XIV. Enactments of 1 Will. IV. c. 60.

XIV. The Statute 1 Will. IV. c. 60, gives the Lord Chancellor or the Court of Chancery some important powers respecting conveyances and transfer of estates and funds vested in trustees, as well as in regard to the appointment of new trustees. But these enactments do not belong to the subject of Equity Jurisprudence, but to the Statutory jurisdiction of the Court.

CHAPTER VIII.

OF THE SPECIFIC PERFORMANCE OF AGREEMENTS AND DUTIES NOT ARISING FROM TRUSTS.

I. Remedy at law.

I. By the Common Law, if a party who ought to perform a contract or covenant, fails to do so, no redress can be had except in damages. (§ 714.)

II. A specific performance will be decreed in Equity, where damages would not afford compensation.

II. In Equity, a specific performance of a contract, covenant, or duty, will be decreed, where damages would not afford an exact compensation for the non-performance thereof, whatever may be the form or character of the instrument containing such contract or covenant, or giving rise to such duty. And hence it will be decreed in all cases of contracts respecting land: because the local character, vicinage, soil, easements, or accommodations of the land, may give it a peculiar value in the eyes of the purchaser, so that damages, which would enable the purchaser to buy other land of the very same marketable value, would not or might not be a complete compensation.

And if a bond is entered into, with a penalty on condition to convey, Equity will not regard it as an option to convey or pay the penalty, but as an agreement to convey at all events, of which it will enforce a specific performance. (§ 715, 717, 718, 746.)

III. Not where they would afford a complete compensation.

III. But Equity will not interfere where damages at Law would amount to a complete compensation. Hence a performance of a contract for the sale of stock or goods will not be enforced in ordinary cases; because damages at Law, calculated on the marketable price of the stock or goods, are generally equivalent, in point of value, to the delivery of the stock or goods contracted for; inasmuch as, with the damages, the purchaser may ordinarily buy stock or goods of the same kind and of the same value to himself. (§ 717, 718, 746.) Where, however, the specific performance of a contract respecting chattels will be decreed on the application of one party, on the ground that damages would not be a complete compensation to him, Equity will entertain the like suit at the instance of the other party, though the relief sought by him is merely in the nature of a compensation in damages or value: for, in all cases

of this sort, the Court acts on the ground that the remedy ought to be mutual. (§ 723.) The same rules apply to agreements respecting personal acts, for the non-performance of which an exact compensation may sometimes be made by way of damages, while in others it cannot. (§ 722—729.)

IV. At Law, contracts and covenants are considered merely as personal and executory,

IV. At Law, contracts and covenants to sell, convey, or transfer land or other property, are considered simply as personal and executory contracts and covenants, and not as attaching to the property in any manner as a present or future charge or otherwise. (See § 714, 790.) But in Equity, from the time of a contract for the sale of land, the vendor, and all claiming by, through, or under him, become, as to the land, trustees for the purchaser and his heirs or devisees; and the purchaser and his personal representatives become, as to the money, trustees for the vendor and his personal representatives. (§ 789, 790.)

but in Equity, as performed, as regards consequences.

Land articled or devised to be sold, and money articled or bequeathed to be invested in land.

In like manner, land articled or devised to be sold and turned into money, is reputed as money; and money articled or bequeathed to be invested in land, has in Equity many of the qualities of real estate, and in particular is descendible and devis-

able as such. (§ 790.) But the person for whose benefit the purchase is so made, can come into a Court of Equity and have the money paid to him without any purchase of the land. (§ 1213.) And if it can be collected from any present or subsequent acts of the party entitled to the beneficial interest, that it is his intention that the property shall retain its existing character, either wholly or in part, Courts of Equity will act on such intention. (§ 793.)

V. Specific performance decreed between persons claiming under the parties.

V. Where the specific execution of a contract respecting lands would have been decreed between the parties, it will be decreed between all persons claiming under them in priority of estate, or of representation or title, unless other controlling equities have intervened. (§ 788.) And where the heir of the purchaser comes into Equity for a specific performance, he may in general require the purchase money to be paid out of the personal estate of the purchaser, in the hands of his personal representatives. (§ 790.)

Purchaser's heir may require the money to be paid out of the personal estate.

VI. Non-compliance with terms of agreement in non-essential particulars,

VI. If the terms of an agreement, either through incapacity or negligence, have not been complied with in particulars which do not pertain to the essence of the contract,

or if there has been a slight misdescription of the property, Courts of Equity will nevertheless decree a specific performance in favour of the party who made the omission or mistake or caused the delay, if compensation can be made for any injury that may have occurred by the non-performance, or for the misdescription of the property. (See § 771, 775—777, and notes.)

or slight misdescription.

VII. And where the bill is not by the vendor, but by the purchaser, and the vendor is incapable of making a complete title to all the property sold, or there has been a substantial misdescription in important particulars, or the terms have not been reasonably complied with on the part of the vendor, Courts of Equity will generally allow the purchaser to proceed with the purchase, *pro tanto;* that is, to have the contract specifically performed as far as the vendor can perform it, and to have an abatement made out of the purchase money or a compensation. (§ 779.)

VII. Want of title,

or substantial misdescription,

or want of reasonable compliance with agreement.

VIII. Where a man has performed a valuable part of an agreement, but is incapable of performing the remainder, by a subsequent accident, without any default on his part, Courts of Equity will enforce

VIII. Accidental incapacity of performing the remainder of an agreement.

the agreement in his favour, (allowing such compensation as may be just,) in case he is not in *statu quo* as to the part which he has performed, but not otherwise. (§ 772, 796.)

IX. Performance *sub modo*.

IX. In some cases a performance of an agreement will be decreed, not according to the letter of the contract, if that would be unconscientious, but according to the change of circumstances. (§ 775.)

X. Agreement not enforced where the parties were incompetent to contract.

X. Of course an agreement entered into by parties incompetent to contract, such as infants and *femes covert*, will not be enforced against them: nor will it be enforced in favour of such parties; because the remedy ought to be mutual. (§ 787, 751, note.)

XI. Nor where the terms are not certain and definite.

XI. Nor will Courts of Equity enforce a contract, although it is written, if the terms are not certain and definite in themselves; for, in such a case, they might decree precisely what the parties did not intend; and besides this, if any terms are to be supplied, it must be by parol evidence; and the admission of such evidence would let in all the mischiefs intended to be guarded against by the Statute of Frauds. (§ 767.)

XII. Nor, in general, in the absence of a valuable

XII. Courts of Equity will not enforce, either against the party himself or any vo-

lunteers claiming under him, any contract or any imperfect gifts *inter vivos*, (not being donations *mortis causa*,) or imperfect assignments of debts or other property, or executory trusts raised by a covenant or agreement, or defective conveyances which are not founded in a valuable consideration, except that if the transaction is founded on a meritorious consideration, as in the case of a provision for a wife and child, it will be enforced against mere volunteers; because a wife and a child have a natural and a moral right to a provision; whereas mere volunteers have no right at all. But if the transfer, assignment, trust, or conveyance is complete at Law, so that no act remains to be done to give full effect to the title, Equity will enforce it throughout, against the vendor and his representatives, although it be merely voluntary. (§ 787, 793 a, b, 973.)

consideration.

XIII. Equity will not interfere, where, in ordinary cases, the contract has become incapable of being substantially performed on the part of the person seeking relief (§736); or if the plaintiff has been guilty of any negligence affecting the essence of the contract (§771); or if there is a substantial

XIII. Nor when it would be morally wrong or inequitable.

defect in the title of the whole or the principal part of the property, not remediable before the decree, or a substantial error in the description of the estate, which was unknown to the purchaser, and in regard to which he was not put upon inquiry (see § 778); or if the character and condition of the property has been so altered, that the terms of the contract are no longer applicable to the existing state of things (§ 750); or if the defendant can show, that by fraud or mistake, the thing bought is different from what he intended, or that material terms have been omitted in the written agreement, or if it can be proved that there has been a variation of it by parol (§ 770); or if the contract is founded in imposition, misrepresentation, undue influence, or fraud of any kind; or if, on any other account, it would be morally wrong or inequitable to enforce performance thereof. (§ 750, 750 a, 769, 787.)

XIV. Nor will equity enforce assignments, contracts, or covenants against public policy, as in the case of I. assignments by officers of the government.

XIV. In like manner, Equity will not enforce agreements, contracts, or covenants which are against public policy. And hence, 1. An officer in the army or navy, or other officer of the government, cannot assign his future accruing pay, or other remuneration

connected with the right of the government to future services from him; because it is contrary to the honour, dignity, and interest of the state, that its servants should be in danger of being reduced to poverty by anticipating those resources which were intended to place them in a suitable condition of respectability, comfort, and efficiency. (See § 769, 1040 c — 1040 f, and notes.)

2. And those involving champerty, maintenance, or buying of pretended titles.

2. So, on principles of public policy, Equity will not uphold assignments which involve champerty, or maintenance, or buying of pretended titles. (§ 1049). Champerty (*campi partitio*) is properly a bargain between a plaintiff or defendant in a cause, and another person, (*campum partire*) to divide the land or other property sued for between them, if they prevail at Law, in consideration of the other person carrying on the suit at his own expense. Maintenance, of which champerty is a species, is properly an officious intermeddling in a suit which in no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it. Each of these is punishable, both at the Common Law and by Statute, as tending to keep alive strife and contention, and to per-

vert the remedial process of the law into an engine of oppression. And the Stat. 32 Hen. VIII. c.9, prohibits the purchase of any right or title to hereditaments, unless the seller, or his ancestor, or those by whom he claims, have been in possession of the same, or of the remainder or reversion thereof, or of the rents and profits thereof, for one year next before the sale. (§ 1048, and note). And Courts of Equity enforce all the principles of Law upon these points. Exceptions are made, however, to the general rule against champerty and maintenance, in the case of father and son, or of an heir apprent, or of the husband of an heiress, or of a master and servant, and the like. (§ 1049).

3. Nor assignments of mere naked rights to litigate.

3. Upon the same principle of not giving any encouragement to litigation, especially when undertaken as a speculation, Equity will not enforce the assignment of a mere naked right to litigate, that is, a right which, from its very nature, is incapable of conferring any benefit except through the medium of a suit; such as a mere naked right to set aside a conveyance for fraud. (§ 1040 g, and note, and 1050, note.) But a person may take an assignment of the

whole interest of another in a contract, or security, or other property which is in litigation, provided he does not undertake to pay any costs, or make any advances beyond the mere support of the interest which he has so acquired. Thus, an equitable interest under a disputed contract for the purchase of real estate may be the subject of a sale. If such an interest is sold by the purchaser under such original contract, he becomes in Equity a trustee for his sub-purchaser, and must permit the sub-purchaser to use his name in legal proceedings for obtaining the benefit of the contract. And without entering into any covenants for the purpose, such sub-purchaser is obliged to indemnify the original purchaser from all the acts which he must do for the sub-purchaser's benefit. (§ 1050.) And so, a creditor may assign his interest in a debt, although he may have commenced a suit to recover it. (§ 1054.) In these cases there is an actual interest in the assignor, independently of litigation; and although it may require continued litigation to enforce it, yet the parties may possibly adjust the matter without further proceedings; whereas, in the case first mentioned,

there is no interest in the assignor, or none but what may result from oversetting an interest in the other party.

XV. Common law rule against assignments of possibilities, or things in action,

XV. It is a rule of the Common Law, that no possibility, right, title, or thing in action, can be granted to third persons, except in the case of the King, to whom and by whom an assignment could always be made; for it was thought that a different rule would be the means of multiplying contests and suits. And, at Law, except in the case of negotiable instruments, and some few other securities, this still continues to be the general rule, unless the debtor assents to the transfer, so as to enable the assignee to maintain a direct action against him, on the implied promise which results from such assent. (§ 1039.) And in the case of assignments of bond or other debts, which are an exception to the above-mentioned rule, it is necessary to sue in the name of the original creditor; the person to whom it is transferred being regarded rather as an attorney than as an assignee. (§ 1056.)

is not adopted in equity.

Courts of Equity, however, give effect to assignments, for valuable considerations, of trusts and possibilities of trusts, and con-

tingent interests, whether in real or personal estate, and even mere expectancies of heirs to their ancestor's estate, and *choses in action*. For, such assignments of a *chose in action* are considered, in Equity, as amounting to an agreement to permit the assignee to make use of the name of the assignor at Law, in order to recover the debt, or to reduce the property into possession; or as a contract entitling the assignee to sue in Equity in his own name, and enforce payment of the debt directly against the debtor, whether he has assented or not, making him, as well as the assignor, if necessary, a party to the bill. (See § 1040, 1040 c., 1044, 1057.) And such assignments of contingent interests, possibilities, and expectancies, are regarded in Equity as amounting to a contract to assign, when the interest becomes vested; and when the interest does so become vested, the claim of the assignee is enforced, not indeed as a trust, but as a right under a contract. (§ 1040 b.)

What amounts to an assignment.

Any thing written, said, or done, to constitute an appropriation of a *chose in action* or fund in favour of another person,

amounts to an equitable assignment. But it is important that the assignee should immediately give notice of the assignment to the debtor; for, otherwise, a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignor before such notice. (§ 1047.)

Important to give notice of assignment.

XVI. Courts of Equity will enforce a specific performance of a parol contract within the Statute of Frauds—

XVI. Parol contracts enforced.

1. Where it is fully set forth in the bill, and it is admitted by the answer of the defendant, and the defendant does not insist on the Statute as a bar. For, under these circumstances, there can be no fraud. And although there may indeed be a temptation to the defendant to commit perjury; yet that is the case with every answer, where the defendant's interest is concerned. And as the defendant does not insist on the Statute, he may be deemed to have waived it; and the rule is, *Quisque renuntiare potest juri pro se introducto.* (§ 755—757, and notes.)

1. When set forth by plaintiff, and admitted.

2. Equity will also enforce such a parol agreement where it was intended to be

2. Where the reducing it to writing was prevented by fraud.

reduced to writing according to the Statute, but that has been prevented by the fraud of one of the parties. (§ 768.)

3. Where partly performed.

3. A parol agreement will also be enforced, whether it is an original agreement, or a variation of or substitute for a prior written agreement, where it has been partly carried into execution (§ 759), and it is shown by satisfactory evidence, to be clear, definite, and unequivocal in all its terms. (§ 764, 770, note.)

What is deemed a part performance.

As to the acts which will be deemed a part performance, they should be such as are clearly and exclusively referable to a complete agreement, and must have been done with no other view than to perform such agreement (§ 762); and they must have put the party who has performed them in such a situation, that it would be a fraud, in the other party, after allowing him to do them, not fully to perform the agreement. (§ 761.) For, the ground on which Courts of Equity enforce specific performance in such cases, is, that if the party allowing these acts to be done, were not obliged to fulfil the agreement, it would be permitting him to commit a fraud, the very crime which the Statute was designed to prevent.

(§ 759.) And hence a depositing, securing, or paying of the purchase money will not be deemed such a part performance as will take the case out of the Statute; for the money can be recovered back at Law. (§ 760.) Nor will the delivery of an abstract of title, giving directions for conveyances, going to view the estate, fixing upon an appraiser to value stock, making valuations or admeasurements, registering conveyances, and acts of the like preliminary or ancillary and equivocal character, be considered as a part performance of the agreement, so as to take it out of the Statute. (§ 762.)

XVII. Parol variations or additions.

XVII. With respect to a parol variation or addition, it is to be observed that evidence of it is totally inadmissible at Law; and that the most unequivocal proofs of it will be required in Equity; and, in general, it will only be allowed to be used by a defendant in resisting a specific performance; not by a plaintiff in compelling such performance. The reason of this distinction is, that the Statute does not say that a written agreement shall bind, so as to prevent a defendant from insisting on a parol variation thereof, but only that a parol

agreement shall not bind. Exceptions occur, however, to this doctrine of the inability of a plaintiff to make use of a parol variation. (1.) Where there has been such a part performance of the parol portion of the agreement, as would enable the Court to decree a specific performance in the case of an original independent agreement. (2.) Where an omission has occurred by fraud; and, in cases not within the Statute of Frauds, where there has been a clear omission by mistake. (3.) Where the defendant sets up a parol variation or addition, and the plaintiff seeks a specific performance of the contract with such variation or addition. (See § 770, note, and 770 a.)

XVIII. Parol promise enforced.

XVIII. Where a person intends to make certain provisions, gifts, or arrangements, for the benefit of others, but omits to do so, on the faith of a promise by another person to carry into effect what was so intended, such a promise will be specifically enforced in Equity. So that where an executor promised a testator that he would pay a legacy, and told the testator he need not put it in his will, the executor was decreed specifically to perform the promise. (§ 781.)

XIX. Negative agreements.

XIX. There are many cases where the agreement is merely negative, and the Court acts merely by injunction; as in the case of a covenant not to dig gravel. These may more properly be termed cases of decrees for specific adherence to agreements. (See § 721.)

TITLE III.

OF ADJUSTIVE EQUITY.

CHAPTER I.

OF ACCOUNT IN GENERAL.

Remedies at law.

THE old action of account has fallen into almost entire disuse, in consequence of its inconvenience and inadequacy as a remedy. And although actions of assumpsit, covenant, and debt, are daily prosecuted in the Courts of Common Law, yet, even in cases in which these remedies are applicable, the cause often proceeds to trial in a manner wholly unsuitable to its real merits. (§ 442, &c.)

Jurisdiction of equity.

In matters of account standing on equitable claims, Equity has universal and exclusive jurisdiction. (§ 454.) In matters of account growing out of privity of contract, and cognizable at Law, Courts of Equity have a general jurisdiction, where there are mutual accounts, and also where the accounts are on one side, but a discovery, or some other remedy peculiar to a Court of Equity, is sought, and is requisite. But when the accounts are all on one side, or where there is a single matter on the side of the plaintiff, and

mere set-off on the other side, and where, in each case, no discovery or other peculiar equitable remedy is sought or required, Courts of Equity will decline taking jurisdiction. (See § 459, 511, 512.)

Division of accounts.

Accounts seem to be divided into open, stated, and settled accounts.

Open accounts.

An open account seems to be an account of which the balance is not struck, or which is not accepted by both parties.

Stated accounts.

A stated account is one that is accepted by both parties. This acceptance need not be expressed, but may be implied from circumstances; as if no objection is made thereto within a reasonable time. What is a reasonable time, is to be determined by the habit of business; and the usual course is required to be followed, unless there are special circumstances constituting a ground for variation. Between merchants, acquiescence is presumed, under ordinary circumstances, after a lapse of several posts. (§526.)

A stated account is ordinarily a bar to relief.

It is ordinarily a good bar to a suit for an account, that the parties have already stated the items and struck the balance; for, under such circumstances, an *indebitatus assumpsit*, or an *insimul computassent*, lies at Law. But if there is any mistake, omission, accident,

When it is not.

or fraud, by which the account stated is vitiated, and the balance is incorrectly fixed, a Court of Equity will interfere; in some cases, by directing the whole account to be opened and taken *de novo;* in others, by allowing it to stand, with liberty to the plaintiff to surcharge and falsify, or by simply opening the account to contestation as to one or two items which are specially set forth by the plaintiff in the bill. (§ 523.) The showing an omission for which credit ought to have been taken, is a surcharge; the proving an item to be wrongly inserted, is a falsification. The *onus probandi* is always on the party having the liberty to surcharge and falsify; and the liberty extends to the examination, not only of errors of fact, but also of errors in Law. (§ 525.)

Different modes of relief.

Meaning of "surcharge and falsify."

Onus probandi.

Extent of the liberty to surcharge and falsify.

In cases of settled accounts, the Court will not ordinarily open the account, but will, at most, only grant liberty to surcharge and falsify, except in cases of apparent fraud. (§ 527.)

Settled accounts.

Acquiescence in an account, even for a considerable time, does not of itself establish the fact of the account having been settled. (§ 528.)

Lapse of time.

Where, however, the demand would have been cognizable at Law, Courts of Equity are governed by the Statute of Limitations. But when the demand is purely equitable, and the bar of the Statute is inoperative, they are sometimes regulated by the analogy of Law, and sometimes by their own inherent principles, not to entertain state demands, and not to encourage laches or negligence, from the difficulty of doing entire justice when the transactions have become obscure, and from the consciousness that the repose of titles and the security of property are manifestly promoted by fully acting upon the maxim, *vigilantibus non dormientibus, jura subveniunt.* (§ 529.)

Running accounts.

In the case of a running account, where there are various items of debt on one side, and various items of credit on the other side, occurring at different times, as in the case of a banking account, the debtor has a right to appropriate any payment he makes to whichever debt he may choose. But if the debtor omits to make such appropriation, then the creditor has a right to appropriate the payment to such of the debts as he may choose. And if neither party

makes any appropriation of it, the successive payments or credits are to be appropriated to the discharge of the items of debts antecedently due, in the order of time in which they stand in the account. (§ 459 a, b, c.)

CHAPTER II.

OF ADMINISTRATION.

I. Jurisdiction.

I. In cases of any complication or difficulty, the Court of Chancery has, practically speaking, almost an exclusive jurisdiction in the administration of assets and the distribution of the residue, founded on the notion of a constructive trust, or on some auxiliary ground, such as the necessity of compelling a discovery, or the consideration that the aid, if any, afforded at Common Law or in the Ecclesiastical Court, is not plain, adequate, and complete. (§ 534—543.)

II. Bill by executor or administrator.

II. The application for assistance is sometimes made by the executor or administrator himself, against the creditors generally, when he finds the affairs of his testator or intestate so much involved, that he cannot safely administer the estate except under the direction of a Court of Equity. Bills filed by executors or administrators are sometimes called bills for conformity, and are not encouraged, because they may be made

use of unduly to keep creditors out of their money. And for this reason, on such a bill, the Court will not interpose by way of injunction to prohibit creditors from proceeding at Law, until there has been a decree against the executors or administrators to account. (§ 544—5.)

III. Bill by a single creditor.

III. But the aid of the Court is more usually sought by creditors. A single creditor may file a bill for payment of his own debt, and seek a discovery of assets for this purpose only, in which case no general account of debts is usually directed to be taken, but only an account of the personal estate, and of that particular debt, which is ordered to be paid in the due course of administration. (§ 546.) It is most usual, however, for one or more creditors to file a bill, commonly called a creditor's bill, on behalf of himself or themselves, and all other creditors who shall come in under the decree. And as a decree in Equity is held of equal dignity and importance with a judgment at Law, a decree on a bill of this sort, being for the benefit of all the creditors, makes them all creditors by decree, on an equality with creditors by judgment, so as to exclude, from the time of such decree,

Bill by one or more creditors, on behalf of themselves and others.

all preference in favour of the latter. (§ 547.) As soon as the decree to account is made in such a suit brought in behalf of all the creditors, the executor or administrator is entitled to an injunction out of Chancery to prevent legal proceedings against him by any of the creditors, except under the direction of the Court of Equity by which the decree is made. (§ 549.)

IV. Division of assets. Definition of legal assets.

IV. Assets are divided into legal and equitable. Legal assets are property which the Law vests or would have vested in the executor or administrator, as such, for the payment of debts generally, whether the aid of a Court of Equity is necessary to reach the property, or not.

Definition of equitable assets.

Equitable assets are property which would not have vested in the executor or administrator by Law, but vests in him for payment of debts generally, simply by virtue of an express disposition of the property, which must be carried into effect by a Court of Equity.

V. Administration of legal assets.

V. Courts of Equity follow the same rules in regard to legal assets, which are adopted by Courts of Law, and give the same priority to the different classes of creditors which is enjoyed at Law.

Priority of antecedent liens, claims, and charges.

And Equity recognizes and enforces all antecedent liens,

claims, and charges *in rem;* according to their priority, whether those charges are of a legal or an equitable nature, and whether the assets are legal or equitable. (§ 543.) But equitable assets, with the exception above mentioned, are distributed *pari passu* among all the creditors, without regard to the priority or dignity of the debts; and, after they are satisfied, among all the legatees or distributees. But if the fund is insufficient to pay all the debts, all the creditors must abate in proportion. And so if the fund, after payment of debts, is insufficient to pay all the legacies, they must all abate in proportion, unless some priority is specifically given by the testator to some legacies over others. (§ 554, 555.) And charitable legacies now abate, as well as legacies of another kind. (§ 1180.)

Administration of equitable assets.

Abatement of debts, and legacies.

VI. Assets are now generally applied in the payment of debts in the following order: first, the general personal estate is applied, except under the circumstances presently mentioned. Secondly, any estate particularly devised simply for the payment of debts. Thirdly, estates descended. Fourthly, estates devised to particular devisees,

VI. Order of administration of different properties.

but charged with the payment of debts, (§ 577).

Personal estate primarily applied, except

The personal estate constitutes the primary and natural fund for payment of debts, and will first be applied, except in these cases:

(1) In the case of express words or plain intention to the contrary.

(1.) When there are express words or a plain intention of the testator to exonerate his personal estate. And if the real estate is directed to be sold for payment of debts, and the personal estate is expressly bequeathed to legatees; then, the personal estate will, by necessary implication, be exonerated. But neither of these circumstances, apart from the other and from circumstances affording similar implication of intention, would be a sufficient indication of an intention to exonerate the personal estate. For it is most probable that a direction to sell real estate for the payment of debts, where no disposition is made of the personal estate, was intended to be followed only in the event of the personal estate proving insufficient for the purpose of paying the debts. And, on the other hand, it is most probable that a bequest of personal estate, where no provision is made for payment of debts out of the real estate, was made subject to the pay-

ment of debts out of such personal property. (2.) Where the testator gives his personal estate as a specific legacy. (3.) Where the debt, charge, or incumbrance is, in its own nature, real; as in the case of a jointure, or of pecuniary portions to be raised out of lands by the execution of a power, or of pecuniary portions to be raised in favour of daughters, under a marriage settlement, out of lands vested in trustees for the purpose. And although, in either case, there may be a personal covenant also to raise the jointure or portions, such covenant will only be regarded as an additional security, not as the primary one. If there is no such personal covenant for the payment of the portions, but only a covenant to settle lands, and to raise a term of years out of the lands for securing the portions; in such a case, even though there be a bond to perform the covenant, the portions are not in any event payable out of his personal estate. (4.) Where the debt was not contracted by the person who died last seised or entitled, but by some other person from whom he took it by descent, or from some other person from whom he purchased it, or from whom his vendor derived it. (See § 571—576, 1003.)

(2.) In case the personalty is specifically bequeathed.

(3.) Where the debt or charge is real.

(4.) Or was not contracted by the person who died last seised or entitled.

VII. Order of satisfaction.

VII. In the order of satisfaction out of the personal estate of the deceased, if it is not sufficient for all purposes, creditors are preferred to legatees; because it is to be presumed that a testator means to be just, by desiring his debts to be paid, before he is generous; and the personal estate, as we have seen, is the natural fund for the payment of debts. Again, specific legatees are preferred to the heir or the devisee of real estate charged with specialities or with the payment of debts; because the heir, instead of being ostensibly an object of the testator's regard, like the specific legatee, only takes by act of law; and the devisee of the real estate so charged standing on no higher ground than the specific legatee, there can be no pretence for making the specific legatee exonerate the devisee. But the devisee of mortgaged premises is preferred to the heir-at-law of descended estates; because the devisee is evidently an object of the testator's bounty, whereas the heir-at-law is not. And, *a fortiori*, the devisee of premises not mortgaged is preferred to the heir-at-law. In case unincumbered lands and mortgaged lands are both specifically devised, but expressly after payment of all the debts, they

are to contribute proportionably in discharge of the mortgage. Where the equities of the legatees and devisees are equal, the Court remains neuter, and suffers the law to prevail. (See § 571.)

But where the personal assets are sufficient to pay all the debts and legacies and other charges, there the heir-at-law or devisee, who has been compelled to pay any debt or incumbrance of his ancestor or testator, binding on him, is entitled (unless there is some other equity which repels the claim) to have the debt paid out of the personal assets in preference to the residuary legatees or distributees, (§ 571,) because, as already observed, the personal estate is the natural and primary fund for the payment of debts.

Lands subject to or devised for the payment of debts are also liable to discharge a mortgage, in favour of the heir or devisee to whom the mortgaged lands may belong. (§ 571.)

VIII. There are many cases in which parties, whose right at Law is confined to one fund, would fail to obtain the satisfaction of their just claims, if left to the course of Law, but are enabled to obtain full satisfaction thereof by means of a particular ad-

VIII. Marshalling of assets,

justment effected by Courts of Equity, termed the marshalling of assets. This may be defined to be, such an arrangement of the different funds under administration, as may satisfy every claim, so far as without injustice such assets can be applied in satisfaction thereof, notwithstanding the claims of particular individuals to prior satisfaction out of some one or more of those funds. (See § 558, 560, 561.) So that if there are two or more different kinds of funds, and several claimants, and one can have recourse to either of those funds, while another is confined to one of them, the former shall either be compelled to seek satisfaction out of that fund to which the latter cannot resort, so far as it will extend, or the latter shall receive compensation out of that fund, in proportion to the amount which the former has unnecessarily taken from that which formed the only source of payment for the latter. (See § 558, 562, 563.)

defined,

and particularly described.

Marshalling in favour of creditors of an inferior rank, or of legatees, or of the heir, or of a devisee.

This plan is adopted with regard to mortgagees and other creditors of the superior kind, in favour of creditors of an inferior rank, or of legatees, or of the heir-at-law, or of a devisee, and with regard to simple contract creditors, in favour of legatees. (See

§ 562—566, 570.) Thus, legatees are permitted to stand in the place of the specialty creditors, against the real assets descended, or of a mortgagee who has exhausted the personal estate, whether the mortgage lands have descended to the heir-at-law, or have been devised to a devisee who is to take subject to the mortgage. But their equity will not generally prevail against a devisee of the real estate not mortgaged, whether he is a specific or a residuary devisee; for, between persons equally taking by the bounty of the testator, Equity will not interfere, unless the testator has clearly indicated some ground of preference or priority of the one to or over the other. (§ 565.) In like manner, where lands are subjected by a testator to the payment of all debts, legatees are permitted to stand, in regard to such land, in the place of simple contract creditors who have exhausted the personal estate so as to prevent a satisfaction of the legacies. (§ 566.)

Legatees put in the place of specialty creditors or a mortgagee.

but not of a devisee of real estate not mortgaged.

Legatees put in the place of simple contract creditors.

The same marshalling of assets takes place as between legacies charged on land, and legacies not so charged. (§ 566.) But the legacies in this case must be given to private individuals for their own benefit.

Marshalling as between legacies charged on land and others not so charged.

For, since the statute 9 Geo. II. c. 36, legacies or bequests to charitable uses, payable out of real estate, or charged on real estate, or to arise from the sale of real estate, are utterly void. (§ 569.) And Equity, following the intention of the legislature, has in modern cases refused to marshal the assets in favour of any charitable bequests, when given, either directly or by way of trust, out of a mixed fund of real and personal estate, by directing the debts and the other legacies to be paid out of the real estate, and reserving the personalty to fulfil the charitable bequests. In effect, the Court distributes the fund as if no legal objection existed to applying any part of it to the charitable bequests, and then holds that so much of those bequests fail, as would in that way have to be paid out of the prohibited fund. (§ 569, 1180.) But where there are general legacies, and the testator has charged his estate with the payment of all his legacies, if the personal estate is not sufficient to pay the whole, the Court will direct the charities to be paid out of the personal estate, and the other legacies out of the real estate, so that the will may be performed *in toto*. (§ 1180.)

On analogous grounds, if a specific legacy has been pledged or incumbered with mortgages or other charges by the testator, the specific legatee is entitled to have his specific legacy redeemed or exonerated; and if the executor fails to perform that duty, the specific legatee is entitled to compensation out of the general assets. Indeed, the same principles apply to specific legatees as to devisees, in respect to the redemption of the subject-matter out of the general assets. (§ 566 a.)

Redemption or exoneration of a specific legacy.

Again, in order to preserve a widow's paraphernalia, which, with the exception of necessary apparel, is subject to debts, Equity will oblige creditors who are entitled to proceed against real assets or funds, to resort to such assets or funds, or will decree her compensation out of the same. (§ 568.)

Protection of a widow's paraphernalia.

IX. With regard to the assets of foreigners, it is to be observed, that in general where a domestic executor or administrator collects assets in a foreign country, without any letters of administration taken out, or any actual administration accounted for in such foreign country, and brings them home, they will be treated as personal assets to be

IX. Assets collected in a foreign country by a domestic executor or administrator.

administered here under the domestic administration. (§ 583.)

Assets received by a foreign executor or administrator, and remitted here.

If property is received by a foreign executor or administrator abroad, and afterwards remitted here, an executor or administrator appointed here could not assert a claim to it here, either against the person in whose hands it happened to be, or against the foreign executor or administrator. The only mode of reaching it, if necessary for the purpose of due administration here, would be to require it to be transferred or distributed after all claims against the foreign executor or administrator had been ascertained and settled abroad. (§ 584.)

By what law administration of such assets is regulated.

In regard to creditors, the administration is to be governed altogether by the law of the country where the executor or administrator acts, and from which he derived his authority to collect them, and not by the law of the country where the deceased lived (§ 585); because every nation has a right to protect itself and its citizens against foreign laws which are opposed to the policy of the nation, and injurious to the interests of its citizens. (§ 586.)

CHAPTER III.

OF MORTGAGES AND PLEDGES.

SECTION I.

Of Mortgages of Real Property.

I. WHEREVER an instrument transferring an estate is originally intended by the parties as a security for money or for any other incumbrance, whether this intention appears from the same instrument or from any other, it is always considered in Equity as a mortgage. Even parol evidence is admissible, in some cases, as in cases of fraud, accident, and mistake, to show that a conveyance which is absolute on its face, was intended to be a mere mortgage or security for money. (§ 1018.)

I. What amounts to a mortgage.

II. Notwithstanding the estate of the mortgagee becomes absolute at Law on the non-payment of the money at the time specified, yet his estate is in Equity treated as a mere security for the debt, and follows the nature of the debt. And although, where the mortgage is in fee, the legal

II. Mortgagee's estate

estate descends to the heir of the mortgagee, yet, in Equity, it is deemed a chattel interest and personal estate, and belongs to

and rights,

the personal representatives as assets. The mortgagee is, however, entitled to enter into possession of the lands, and to take the rents and profits, unless there is some agreement to the contrary; and he may grant leases, and avoid any leases that have been made by the mortgagor subsequently to his

and liability to re-convey and account.

mortgage. (§ 1016.) But, in such case, if the mortgagor applies to be allowed to redeem, before the right of redemption is lost by a lapse of twenty years, during which no acknowledgment has been made by the mortgagee of the mortgagor's title or of his right of redemption, the mortgagee will then be treated precisely as a trustee for the mortgagor, inasmuch as he will be compelled to re-convey the estate, and account for every kind of profit that he has made. (See § 1016, 1013, note, and § 1028 a, and 3 and 4 Will. IV. c. 27, s. 28.)

III. Mortgagor's estate and rights.

III. The equity of redemption, or right which the mortgagor has, in Equity, of redeeming the estate, is so inseparable an incident to a mortgage, that it cannot be disannexed from such a transaction, even by an

express agreement. (§ 1019.) And this constitutes an equitable estate in the land, in the nature of a trust estate, which may be granted, devised, and entailed; and if entailed, might be barred by a fine or recovery, and is liable to a tenancy by the curtesy, but before the statute 3 & 4 W. 4, c. 105, s. 2, was not liable to dower. (§ 1015.) The mortgagor is not entitled to the possession in respect of such equitable estate, unless there is some special agreement to that effect, but he holds it solely at the will of the mortgagee, who may at any time, without giving any prior notice, recover the same by ejectment against him or his tenants. But so long as he continues in possession by the permission of the mortgagee, he is entitled to take the rents and profits in his own right, without rendering any account whatever to the mortgagee. But he will not be permitted to do any thing which may diminish the security of the mortgagee. (§ 1017.)

IV. Tacking

IV. If a third incumbrancer by mortgage without notice of a second incumbrance at the time of lending his money, should purchase the first legal mortgage, judgment, statute, or recognizance, even after notice of the second mortgage, so as to acquire the

legal title, and should hold both securities in his own right, Equity will tack both incumbrances together in his favour: so that the second mortgagee will not be permitted to redeem the first, without redeeming the third also; on the principle that where equities are equal the Law shall prevail. But if a puisne creditor by judgment, statute, or recognizance, should buy in a prior mortgage, he would not be allowed to tack his judgment to such mortgage, so as to cut out or postpone a mesne mortgage; because he did not originally advance his money on the immediate credit of the land, and, by his judgment, he did not acquire any right in the land, but before the statute 1 & 2 V. c. 110, only a lien on the land, which might or might not be enforced on it; (see § 412, 416, 418, 421;) although now, under the 13th section of that Act, except as regards purchasers, mortgagees, or creditors, who became such before the time for the commencement of the Act, a judgment will operate as a charge on real estate.

If a first mortgagee lends to the mortgagor a further sum on another mortgage, or on a statute or judgment, or even on note, if distinctly agreed at the time to be on the se-

curity of the mortgaged property, he will be entitled to retain against the mesne mortgagee till both sums are paid. (§ 417 and note.) And yet a prior mortgagee, having a bond debt, has never been permitted to tack it against any intervening incumbrancer of a superior rank between his bond and mortgage, nor against other specialty creditors, nor even against the mortgagor himself, but only against his heir, in order to avoid circuity of action. The reason given is, that the bond debt, except in the hands of the heir, is not a charge on the land. (§ 418.)

And when a puisne mortgagee has brought in a prior incumbrance, but the legal estate is vested in a trustee, or the puisne mortgagee has not obtained the legal title, or he takes in *autre droit*, the incumbrances are paid in the order of their priority in point of time, according to the maxim, *Qui prior est tempore, potior est in jure*, and the principle that he who has the better right to call for the legal title, or for its protection, shall prevail. (§ 419.)

Where a mortgagee has two mortgages on different estates separately mortgaged to him by the same mortgagor, and one of them is a deficient security for the debt, and

the other is more than sufficient, the mortgagor and his heirs, or the purchaser of one estate, will not be permitted to redeem it without redeeming the other; because he who seeks Equity must do Equity. (§ 1023, note.)

V. Who may redeem.

V. Even a tenant for life, a tenant by the curtesy, a jointress, a tenant in dower in some cases, a reversioner, a remainder-man, a judgment creditor, a tenant by elegit, and indeed every other person having a legal or equitable interest in or lien on the land, may insist on redeeming the mortgage, in order duly to enforce his claim. When any such person does so redeem, he becomes substituted to the rights and interests of the original mortgagee. But a mere annuitant of the mortgagor, who has no interest in the land, has no title to redeem. (§ 1023.)

VI. Foreclosure, and not a sale, will be decreed, where there is no power of sale,

VI. As to the remedy of the mortgagee to secure the discharge of the mortgage, a bill for a foreclosure is in common cases deemed the appropriate and exclusive remedy. And where there is no power of sale inserted in the mortgage-deed, Courts of Equity refuse to decree a sale against the will of the mortgagor, except in these cases:

except in certain cases.

(1.) Where the estate is insufficient to pay the incumbrances. (2.) Where the mortgagor is dead, and there is a deficiency of

personal assets. (3.) Where the mortgage is of a dry reversion. (4.) Where the mortgagor dies, and the estate descends to an infant. (5.) Where the mortgage is of an advowson. (6.) Where the mortgagor becomes bankrupt, and the mortgagee prays a sale. (7.) Where the mortgage or charge is purely equitable, as by a deposit of title-deeds. (8.) Where the land in mortgage is subject to a sale by the local Law, as in Ireland. (§ 1026.) The grounds of the distinction, as it respects the first six of these cases, would appear to be this; that from the nature of the property, it would not be worth while to redeem it, or from the circumstances of the mortgagor, he or his representatives are unable to redeem it; so that a bill for a foreclosure would probably have no other effect than to secure the property to the mortgagee; and, in case the value of the property should be less than the amount of the incumbrance, this would not be so advantageous to him as a sale; and in case it should turn out more than sufficient to pay the debts, a sale would be more advantageous to the mortgagor, as he would have the surplus after paying off the incumbrance.

VII. Equitable mortgages.

VII. Besides mortgages created by a formal instrument, and valid at Law as well as in Equity, there are Equitable Mortgages, which are those that are created by a deposit of title-deeds with a creditor, as security for an antecedent debt, or on a fresh loan of money. (§ 1020.)

The doctrine that such a deposit creates an Equitable Mortgage appears to arise from the nature of the case. A Court of Law could not assist a debtor who has made such a deposit, to recover back his title-deeds by an action of trover; the answer to such an action being, that the title-deeds were pledged for a sum of money, and that until the money is paid, the party has no right to them. So if the party should come into Equity for relief, he would be told, that before he sought Equity, he must do Equity, by repaying the money for which the deeds had been lodged in the other party's hands. (§ 1020, note.)

If, before any money is advanced, the deeds are deposited, with a view to prepare a future mortgage, such a transaction is not deemed an Equitable Mortgage. (§ 1020, note.)

Section II.

Of Mortgages and Pledges of Personal Property.

I. A mortgage of personal property is a transfer of the property itself, subject to be defeated by the performance of the condition within a certain time. But a pledge only passes the possession, or at most a special property to the pledgee, with a right of retainer till the debt is paid or the other's engagement is fulfilled. (§ 1030.)

I. A mortgage and a pledge distinguished from each other.

II. In the case of Mortgages or Pledges of Personal Property, the mortgage or pledge may be held till a subsequent debt or advance is paid, as well as the original debt, on the ground that it may be presumed that the mortgagee or pledgee would not have lent the further sum except on the credit of the mortgage or pledge, and that he who seeks Equity must do Equity. This presumption may indeed be rebutted by circumstances; but unless it is rebutted, it will generally prevail in favour of the lien, against the pledgor himself, although not against his creditors, or against subsequent purchasers. (§ 1034.)

II. Tacking.

III. Mortgagor's right to redeem, and mortgagee's right to sell.

III. A mortgagor of personal property may redeem, if he brings his bill within a reasonable time. But, on the other hand, the mortgagee may, on due notice, sell the property, instead of bringing a bill of foreclosure. (§ 1031.) The reason would appear to be that on which the Court of Chancery acts in not decreeing a specific performance of agreements respecting personal property; namely, that other things of the same kind, and of the very same worth, even to the party himself, may be purchased for the sum which the articles in question fetch; and therefore if such property is mortgaged, the mortgagee may properly be allowed to sell it, on due notice, without the inconvenience of filing a bill of foreclosure.

IV. Pledgor's right of redemption.

IV. In the case of pledges, if a time for redemption is fixed by the contract, still the pledgor may redeem it afterwards, if he applies within a reasonable time. And if no time is specified for the payment, the pledgor may redeem it at any time during his life, unless he is called upon to redeem by the pledgee; and if he fails in so redeeming it, his representatives may redeem it. But his remedy is at Law, unless some special ground is shown; as, if an account

or discovery is wanted, or there has been an assignment of the pledge (§ 1032.)

VI. Pledgee's right of sale.

VI. On the other hand, the pledgee may bring a bill in Equity to foreclose, and sell the pledge; but it has been also said, that on due notice given to the pledgor, the pledgee may sell the pledge without any decree of sale; (§ 1033;) and this would seem to be true, as there would appear to be no ground of distinction between mortgages and pledges of personalty, in that point of view; for the reason above given as to the propriety of a sale in the case of a mortgage, would seem equally to apply to the case of a pledge.

CHAPTER IV.

OF APPORTIONMENT AND CONTRIBUTION.

I. Jurisdiction.

I. In several cases under these heads, assistance may be had at Law. But even in these cases it may be necessary to resort to Equity, instead of proceeding at Law, in order to avoid a multiplicity of suits; for where there are several parties, each is only liable at Law to contribute for his own portion; so that separate actions and verdicts are necessary against each. (§ 477, 478.)

Two classes of apportionments.

II. An apportionment may be made, either of a benefit, or of an incumbrance, loss, expense, or liability; and in the case of an apportionment of the latter class, a corresponding contribution is enforced, consequent on such apportionment.

Illustrations of the first.

To give an instance of an apportionment of a benefit, if an apprentice-fee is given, and the master afterwards becomes bankrupt, Equity will decree an apportionment. (§ 472.) And so where portions are payable to daughters at a given age, or on

marriage, and until the portions are due, maintenance is to be allowed, payable half yearly, at specific times; if one of the daughters should attain the given age at an intermediate period, the maintenance will be apportioned in Equity. (§ 479.)

Illustrations of apportionments of the second class.

On the other hand, with regard to an apportionment of, and contribution towards, an incumbrance, loss, expense, or liability, if a man, owning several pieces of land, should be bound in a statute, judgment, or recognizance, operating as a lien on the land, and should alien different pieces to different persons, there, if one alienee should be compelled, in order to save his land, to pay the statute, judgment, or recognizance, he would be entitled to contribution from the other alienees. (§ 476.) So the purchasers of different portions of an estate in mortgage are bound to contribute proportionally to keep down the interest or to pay off the principal. (§ 484.) And so it is with different persons having distinct limited interests in an estate which is under mortgage. (§ 485.)

III. Voluntary discharge of an incumbrance by a tenant in tail in possession;

III. If a tenant in tail in possession pays off an incumbrance, it will ordinarily be treated as extinguished, and the remainder-

man cannot be called upon for a contribution, unless the tenant in tail has kept alive the incumbrance by some suitable assignment, or has otherwise manifested his intention to hold himself out as a creditor of the estate in lieu of the mortgagee; because a tenant in tail in possession can make himself absolute owner of the estate; and therefore, if he discharges incumbrances, he is presumed to do so in the character of owner, unless he clearly shows that he intends to become a creditor in respect of such discharge. But the like doctrine does not apply to a tenant in tail in remainder, whose estate may be altogether defeated; for, if he pays off an incumbrance, it must be presumed that he means to keep it alive. *A fortiori*, the doctrine does not apply to the case of a tenant for life paying off an incumbrance. But, in both cases, the presumption may be rebutted by circumstances which demonstrate a contrary intention. (§ 486.)

by a tenant in tail in remainder;

by a tenant for life.

IV. With respect to the compulsory discharge of incumbrances, the modern rule is this; that the tenant for life shall contribute, beyond the interest, in proportion to the benefit he derives from the liquidation of the

IV. Compulsory discharge of incumbrances.

debts, and the consequent cessation of interest, which of course will much depend on his age, and the computation of the value of his life. If the estate is sold to discharge incumbrances (as the incumbrancer may insist that it shall), the surplus which remains after discharging the incumbrance is to be applied as follows: The income thereof is to go to the tenant for life during his life; and then the whole capital is to be paid over to the remainder-man or reversioner. (§ 487.)

V. Keeping down the interest on incumbrances.

V. A tenant for life is bound to keep down the interest. But a tenant in tail in possession, if of full age, cannot be compelled by the remainder-man or reversioner to pay the interest; because he can make himself absolute owner of the estate; and if the remainder-man or reversioner ultimately takes, instead of having any just ground of complaint, that the interest has not been kept down, he has cause to be grateful to the tenant in tail for not barring the remainder or reversioner. If, however, such a tenant in tail does pay the interest, his personal representatives have no right to be allowed the sum so paid, as a charge on the estate; because he is

supposed to have kept down the interest, as owner, for the benefit of the estate. (§ 488.)

If a tenant in tail is an infant, his guardian or trustee will be required to keep down the interest; because the infant cannot, of his own free will, bar the remainder or reversion. (§ 488, note.)

VI. Contribution between sureties. Jurisdiction.

VI. Another case of apportionment and contribution arises in regard to sureties. Originally, it seems to have been questioned whether contribution between sureties, unless founded on some positive contract between them, could be enforced at Law. And although there is now no doubt that it may, yet the legal jurisdiction now assumed, in no way affects that which belongs to Equity. (§ 495, 496.)

Where such contribution is enforced.

If one surety, on the default of the principal, is compelled to pay the whole sum of money, or to perform any other obligation for which all become bound, he can oblige each of his co-sureties, and (in Equity, though not at Law) the representatives of any deceased surety, to contribute, whether the sureties are jointly and severally bound, or only severally, unless there is an express or implied contract to the contrary, and whether their suretyship arises under

the same instrument, or under different instruments, if all the instruments are primary concurrent securities for the same debt. (See § 492, 495, 497, 498.) But if the instrument is intended to be only subsidiary to and a security for the other in case of a default in payment, and not to be a primary concurrent security, the surety in the subsequent bond would not be compelled to aid those in the other by any contribution. (§ 498.)

What is the quantum.

The contribution will generally be equal, but if there is a contract express or implied to the contrary, it will be otherwise. (§ 498.) And if there are several sureties, and one of them is insolvent, and another pays the debt, he can, in Equity, although not at Law, recover from the solvent surety or sureties, as much as such solvent surety or sureties would have had to pay if the insolvent had never undertaken the office of surety. (§ 496.) And when there are several distinct bonds, with different penalties, and a surety on one bond pays the whole, the contribution is in proportion to the penalty of their respective bonds. (§ 497.)

VII. General average.

VII. Another instance of apportion-

ment and contribution is that of general average, which is a general contribution that is to be made by all parties in interest towards a loss or expense, which, in the course of a voyage, is voluntarily sustained or incurred for the benefit of all; as where goods are thrown overboard to lighten the ship. (§ 490.) The contribution is confined to the property saved thereby, including the ship, the freight, and the cargo. It is obvious that this could not be adjusted at Law without a multiplicity of suits. (§ 490, 491.)

CHAPTER V.

OF PARTNERSHIP.

1. With regard to the jurisdiction in cases of partnership, a controversy sometimes arises as to the existence of the partnership itself, or the number and names of the parties may be unknown, so as to render a discovery necessary. (§ 660.) But supposing a partnership to exist, if the articles of partnership are under seal, and there has been any violation thereof, it is properly remediable by an action of covenant. If there are written articles not under seal, or the partnership is by a parol agreement, the proper remedy for any breach of the stipulations, is by an action of assumpsit. Both these remedies, however, are utterly inadequate to provide for many exigencies connected with partnership (§ 661); and the action of account is so dilatory, cumbersome, and inconvenient, as to be quite unfit for the purpose, and in some cases it is not available at all. (§ 662, 663.) Hence, Courts of Equity exercise a full concurrent

I. Jurisdiction.

jurisdiction with Courts of Law, in all matters of partnership; and indeed it may be said that, practically speaking, they exercise an exclusive jurisdiction over the subject in all cases of any complication or difficulty. (§ 683.)

II. Specific performance of an agreement to enter into partnership.

II. It may be expedient to observe, in this place, though the observation belongs to the general subject of executive rather than adjustive Equity, that in general the Court of Chancery will not enforce a specific performance of a contract to enter into a partnership which may be dissolved instantly at the will of either party, since that would ordinarily be useless. But it will decree a specific execution of an agreement, to enter into a partnership for a specific time, and to furnish a share of the capital stock. (§ 666.) And after a partnership has commenced, the Court will carry into effect the articles of partnership, unless there is an entirely adequate remedy at Law. An exception, however, occurs, where there is an agreement that in case of any dispute, the same shall be referred to arbitration; for, in these cases, Courts of Equity as well as Courts of Law will leave the parties to their own pleasure. (§ 667, 670.)

Carrying into effect the articles of partnership, where a partnership has commenced.

III. Where a dissolution has taken place, not only will an account be decreed, but, if necessary, a manager or receiver will be appointed, to close the partnership business, and make sale of the partnership property. (§ 672.) But they are not inclined to decree an account, except under special circumstances, if there is no actual or contemplated dissolution, so that all the affairs of the partnership may be wound up. (§ 671.)

III. Account, and manager or receiver.

IV. Courts of Equity will dissolve the partnership before the regular time, if it is impracticable to carry on the undertaking at all, or at least according to the stipulations of the articles, or in case of the insanity, permanent incapacity, or gross misconduct, of one of the parties. (§ 673.)

IV. Dissolution decreed.

V. On the other hand, in the case of a partnership existing during the pleasure of the parties, with no time fixed for its renunciation, Equity will grant an injunction against a dissolution, if a sudden dissolution is about to be made in ill faith, and would work irreparable injury. (§ 668.)

V. Dissolution prohibited.

VI. In like manner, the Court of Chancery will interfere by injunction to prevent a

VI. Injury prevented.

partner from doing any acts injurious to the partnership. (§ 669.)

VII. Real estate.

VII. Real estate bought and held for the purposes of the partnership, as a part of the stock in trade, will be considered in Equity, although not at Law, as personal estate to all intents and purposes, whatever may be the form of the conveyance; so as to be subject to all the equitable rights and liabilities of the partners and their creditors; and so as to pass to the personal representatives and distributees, on the death of a partner, except, perhaps, where there is a clear and determinate expression of the deceased partner that it shall go to his heir-at-law beneficially. (§ 674.)

VIII. Priority as between joint and separate creditors.

VIII. The creditors of the partnership have a right to the payment of their debts out of the partnership funds, before the private creditors of either of the partners; although, at Law, this is generally disregarded. On the other hand, the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything; although, at Law, a joint creditor may proceed directly against the separate estate. (§ 675.)

IX. Creditors may proceed against a deceased partner's estate in the first instance.

IX. The partnership creditors may in the first instance proceed against the executors or administrators of a deceased partner, leaving them to their remedy over against the surviving partner; because every joint debt is joint and several. Yet the surviving partners would be proper if not necessary parties to a suit in Chancery in such a case. (§ 676.)

Similar rule applies to other joint debtors.

A similar rule applies to all cases where there is a joint loan to several persons who are not partners. (§ 676.)

CHAPTER VI.

OF CERTAIN SPECIAL ADJUSTMENTS IN CASES OF DEBTOR AND CREDITOR.

SECTION I.

Of the Marshalling of Securities.

General doctrine.

WE have already had occasion to consider the marshalling of assets in cases of Administration, to which the present topic bears a close analogy. The general doctrine is, that if one party has a lien on or interest in two funds for a debt, and another party has a lien on or interest in one only of the funds, for another debt, and the claims of both could not be satisfied if the former were to resort to the fund in which alone the latter is interested; there the latter creditor can, in Equity, compel the former to resort to the other fund in the first instance for satisfaction, unless that would operate to the prejudice of the party entitled to the double fund. (§ 633.)

No marshalling where one of two

But although the different securities of one and the same common debtor will be

marshalled, so as to satisfy the different creditors, yet where two or more persons are under a joint obligation to one creditor, and one of them is also indebted to another creditor, Equity will not compel the joint creditor to satisfy his claim by proceeding against the joint debtor who is only indebted to such joint creditor, so as to leave the other joint debtor's property for the several creditor; unless it appears that the joint debt ought in fact to be paid by the debtor who is only indebted to the joint creditor, or that there is some other supervening equity. (§ 642—644.) For, in general, it would seem that the several creditor can have no equity to counterbalance the right of the debtor who is only jointly indebted to the joint creditor, to have a contribution from the other joint debtor.

joint debtors is also a several debtor of another creditor.

SECTION II.

Of the Mutual Right to the Benefit of Securities between a Creditor and Sureties.

Sureties are entitled to the benefit of all securities which have been taken by any of their co-sureties to indemnify themselves against their liability. (§ 499.)

Courts of Equity have also held that on payment by the sureties to the creditor of the debt due by their principal, they are entitled to the full benefit of all securities possessed by the creditor, whether of a legal or of an equitable nature, collateral to or other than the original principal security whereby the debt is evidenced, of which the sureties cannot insist on an assignment, because, by the payment of the debt, the title derived under the instrument has become extinct, and therefore an assignment thereof would be useless; and if the surety should afterwards sue for the debt at Law, in the name of the creditor, the principal might plead payment in bar of the action. Thus, if at the time when the bond of the principal and surety is given, a mortgage is made by the principal, to be an additional security for the debt; there, if the surety pays the debt, he will be entitled to an assignment of the mortgage, and to stand in the place of the mortgagee; and as the mortgagee cannot get back his estate without a re-conveyance, the assignment and security will remain an effectual security in favour of the surety. But the surety could not obtain an assignment of the bond

itself, nor, for the same reasons, could he insist on an assignment of a judgment, after he had paid off the debt on the judgment. (§ 499, 499 b, 499 c.)

On the other hand, if a surety has a counter bond or security from the principal, the creditor will be entitled to the benefit of it, and may in Equity reach such security to satisfy his debt. (§ 502.)

SECTION III.

Of Set-off.

Jurisdiction.

It is difficult to ascertain the true nature and extent of the jurisdiction of the Court of Chancery in regard to set-off. And the doctrine of set-off is practically of rare occurrence in cases not within the Statutes of Set-off, 2 Geo. II. c. 22., and 8 Geo. II. c. 24, or within the Bankrupt Laws. (§ 1431, 1438.)

Application of the doctrine is limited.

Connected accounts.

As to connected accounts of debts and credits, it is certain that both at Law and in Equity, and without reference to the Statutes, the balance only was recoverable. (§ 1434.)

Independent debts.

But it would seem that Courts of Equity, in virtue of their general jurisdiction, are

accustomed to grant relief in all cases where, though there are mutual and independent debts, yet there is a mutual credit between the parties, founded at the time on the existence of some debt due by the crediting party to the other. (§ 1435.) But the mere existence of cross demands will not be sufficient to justify a set-off in Equity. (§ 1436.)

Where one debt is joint, and the other separate.

Equity, following the Law, will not allow a set-off of a joint debt against a separate debt, or of a separate debt against a joint debt; unless there was a joint credit given on account of the separate debt, or there are other special circumstances to justify such an interposition. Or, to state the rule more generally, they will not allow a set-off of debts accruing in different rights. (§ 1437.)

Debts accruing in different rights.

CHAPTER VII.

OF CERTAIN MISCELLANEOUS CASES OF ACCOUNT.

I. Agency.

I. In agency transactions, a discovery and close inspection of books and vouchers is necessary, which could not be had at Law. (§ 462.)

If an agent does not keep regular accounts and vouchers, where the duty is incumbent upon him, he will not be allowed the compensation which would otherwise belong to his agency. And if he mixes up his principal's property with his own, he is put to the necessity of showing clearly what part of the property belongs to him; and so far as he is unable to do this, it is treated, both at Law and in Equity, as the property of the principal. (§ 468.)

II. Mesne profits.

I. In the ordinary case of mesne profits, where aid will be clearly given at Law, Courts of Equity will not interpose. (§ 511.) Wherever relief is afforded in Equity, it will be found that there is some peculiar equitable ground for interference; such as fraud,

accident, or mistake, the want of a discovery, some impediment at Law, the existence of a constructive trust, or the necessity of interposing to prevent multiplicity of suits. (§ 512.)

III. Waste.

III. In cases of waste, relief is ordinarily at Law. Yet, according to some cases, if a discovery is wanted, that alone, if it is obtained and is of importance, will carry the ulterior jurisdiction to account, in order to prevent a multiplicity of suits. But other decisions, and those which are relied on as constituting the established doctrine of the Court, seem to require, in order to maintain the jurisdiction for an account, that there should be a prayer for an injunction to prevent future waste. (§ 517.)

IV. Tithes and moduses.

IV. Matters of account also arise in regard to tithes and moduses. Wherever the right to tithe is clearly established, an account is consequent. But if the right is disputed, it must first be established at Law before an account will be decreed. (§ 519.)

CHAPTER VIII.

OF DAMAGES AND COMPENSATION.

I. It would seem that damages or compensation ought to be decreed in favour of a plaintiff in Equity, only as incident to other relief, sought by the bill, and actually granted, or where there is no adequate remedy at Law, or where some peculiar equities intervene. (§ 794.) I. General rule as to damages or compensation to a plaintiff.

Damages or compensation are generally assessed by directing an issue *quantum damnificatus* to be tried by a jury, in cases of a complicated nature, or by directing a reference to a Master in other cases. (§ 795.) How assessed.

II. Compensation is often given to a defendant, on the principle that he who seeks Equity must do Equity. Thus, if a plaintiff in Equity seeks the aid of the Court to enforce his title to land against an innocent person, who has made improvements on it, supposing himself to be the absolute owner thereof, that aid will be given only on the terms that the plaintiff shall make a compensation to such innocent person, propor- II. Compensation to a defendant.

tionate to the benefit which will be received from those improvements. (§ 799 a.)

III. Jurisdiction to relieve against penalties and forfeitures.

III. With regard to penalties and forfeitures for breach of conditions and covenants, there was originally no relief but in Equity; and although, by several Statutes, relief may now be had at Law in a great variety of cases, yet the original jurisdiction in Equity still remains. (§ 1301.)

Where such relief is afforded.

Wherever a penalty or forfeiture appears to have been inserted merely to secure the performance of some act, or the enjoyment of some right or benefit, Equity regards the performance of such act, or the enjoyment of such right or benefit, as the substantial object of the party interested therein; and if a compensation can be made for the non-performance or want of enjoyment thereof, it will relieve against the penalty or forfeiture, by simply decreeing a compensation in lieu of the same, proportionate to the damage really sustained. (See § 1314, 1320.)

Amount of compensation in such cases.

If a compensation can be made, and the penalty is to secure the mere payment of a sum of money, the party will be relieved on paying the principal and interest. If it is to secure the performance of some other act, the Court will retain the bill, and direct an

issue, *Quantum damnificatus*, and when the amount of damages is ascertained by a jury on the trial of such issue, relief will be granted on the payment of such damages. (§ 1314.)

Such relief is justly granted.

Although it may be urged that in such cases as these, it was the folly of the party to make such a stipulation, yet the folly of one man cannot authorize the other to commit an act of gross oppression, or oblige the former to suffer a loss wholly disproportionate to the injury received. (§ 1316.) And although, in some cases, from peculiar circumstances, which cannot be taken into account, the compensation awarded may not amount to an adequate compensation, yet that is no solid objection against the interference of Courts of Equity: for, a great injury is always prevented by such interference; whereas the mischief caused thereby is only occasional; and all general rules must work occasional mischiefs. (§ 1316, note.)

IV. No relief against liquidated damages, where they are really such.

IV. But Courts of Equity will not relieve in cases of liquidated damages, which occur where the parties have agreed, that in case one party shall do a certain act, or omit to do such an act, the other party shall

receive a certain sum, as the just amount of the damage sustained by such act or omission, and where the sum so agreed to be paid is not grossly disproportionate to the nature or extent of the injury. If the sum is so disproportionate, and it is in reality penal, although it may assume the disguise of liquidated damages, the Court of Chancery will treat it as a penalty, and relieve against it accordingly. (§ 1318.)

V. Where relief is granted as to a breach of covenant.

V. In the case of a breach of a covenant to pay rent, Equity will relieve even where the term is gone at Law by reason of an entry by the landlord by virtue of a clause of re-entry; for that is deemed to be a mere security for the payment of the rent. (§ 1315, and note to 1323.) But no relief will be granted in Equity in case of forfeiture for the breach of any covenant other than a covenant to pay rent, unless on the ground of accident, mistake, or fraud; for it has been considered that even where the damages are capable of being ascertained by a jury, the jurisdiction of Equity in giving relief is a dangerous jurisdiction, and rarely works a real compensation. (§ 1320—1323.)

VI. Relief not granted.

VI. And Equity will not mitigate any

penalty or forfeiture imposed by Statute; for that would be in contravention of the direct expression of the legislative will. (§ 1326.)

against Statutory penalties or forfeitures.

VII. On the other hand, it is an uniform rule in Equity never to enforce either a penalty or a forfeiture. (§ 1319.)

VII. A penalty or forfeiture never enforced.

CHAPTER IX.

OF ELECTION.

Definition. ELECTION is the choosing between two rights, by a person who derives one of them under an instrument in which a clear intention appears that he should not enjoy both.

Principle of the doctrine. It is founded on this principle, that a person cannot accept and reject the same instrument. (See § 1077, note.)

Where election arises at Law. The instances in which Courts of Law have put a party to his election, are cases of title, which, by reason of their inconsistency, are technically capable of contemporaneous assertion; as in the case of a contemporaneous estate for life and in tail in the same land, or a claim of a tenant under and against his landlord; or a claim to dower both in the land taken and the land given in exchange. In Courts of Law, the suitor is permitted to assert rights which are confessedly repugnant, so far as the intention of the party constitutes repugnancy. Thus, if a man makes a feoffment in fee of lands or tenements, either before or after

marriage, to the use of the husband for life, and afterwards to the use of *A.* for life, and then to the use of the wife for life, in satisfaction of her dower; this is no jointure within the statute; and although *A.* should die before the husband, and after the death of the husband, the wife should enter, yet this would not bar her dower, but she would have her dower also. And the series of decisions under that part of the Statute of Uses which relates to jointures (the only instance in which the doctrine has been applied at Law in a manner analogous to its application in Equity) are expressly founded on the provisions of the statute, in contrast to the rules of the Common Law. (§ 1080, note.

Where election arises in Equity.

The doctrine of election arises in Equity, in cases where a grantor, or, more commonly, a testator, expressly gives away, either knowingly or by mistake, that in which he has no interest, or the whole of that in which another person besides himself has an interest, and in the same instrument makes a gift to the owner of the property so given away, or to the person entitled to such interest. In such cases the owner of such property, or the person en-

titled to such interest, cannot both take the gift and retain his own property or interest; but if he takes the gift, he must resign his own property or interest. On the other hand, if he should elect to hold his own property or interest, or, as the phrase is, if he should elect against the instrument, he cannot have the gift. And yet Equity, in not suffering the disposition by which such gift is made to enure to the benefit of the person so electing against the instrument, will not render that disposition inoperative, but will make it the means of effectuating that intention of the author of the instrument which such person has frustrated by so electing to retain his own property or interest: for Equity will treat such gift as a trust in the donee or devisee, the person so electing, for the benefit of the party disappointed by such person's refusing to give up his own property or interest. (See § 1077, note, § 1082, 1083, 1086, 1088—9, 1093.) And this is the case even where in a will, not within the recent Act of Wills, (1 V. c. 26,) a devise of an estate is made to the testator's heir, and the heir, according to the old rule, takes such estate by descent, and not by purchase, and, by the same will,

the testator devises to another person an estate belonging to the heir, over which the testator had no disposing power. (§ 1094.) And the doctrine is equally applied to all interests, whether immediate or remote, vested or contingent, of value or of no value, and whether in real or personal estate. (§ 1096.)

The same doctrine of election also arises in cases where it was apparently a testator's intention to dispose of all the property he might have at the time of his death, and the heir, who is a devisee under the will, claims property which was purchased subsequently to the will, and which, consequently, under the old law, did not pass by the will, but was intended to pass to another person under the general words of the will. (§ 1094.)

A person electing against a will, however, does not forfeit the whole of the benefit intended for him, where the value of the gift exceeds that of his own property or interest; but he is only obliged to compensate in value the claimant whom he has disappointed by his refusing to give up his own property or interest. (§ 1085.) For a Court of Equity interfering to control his legal rights, for the purpose of executing the intention of the testator, is justified in its

interference so far only as that purpose requires. The heir preventing the effectuation of the testator's intention in the prescribed form, it is executed by approximation, or, as it is technically called, *cy pres.* (§ 1085, note.)

Election as to one benefit.

A person may elect against a will as to one benefit, such as a legacy charged with a portion, without being precluded from taking another benefit by the same will; unless it is fairly inferrible, from the nature of the different benefits, that the party should either take all or reject all. (§ 1091).

Election need not be made in ignorance of circumstances.

The party is not bound to make an election till all the circumstances are known. And if he should make a choice in ignorance of the real state of funds, or under a misconception of the extent of the claims on the fund elected by him, it will not be conclusive on him. And he is entitled, in order to make an election, to maintain a bill in Equity for a discovery, and to have all the accounts taken to ascertain the real state of the fund. (§ 1098.)

Election presumed.

An election may be presumed from a long acquiescence, or from other circumstances. (§ 1097.)

No election in the case of creditors.

The doctrine of election is not applied in

the case of creditors. They may take the benefit of a devise for payment of debts, and also enforce their legal claim against other funds disposed of by the will, for a creditor claims not as a mere volunteer, but for a valuable consideration, and *ex debito justitiæ*. (§ 1092.)

CHAPTER X.

OF SATISFACTION.

Definition.

SATISFACTION may be defined to be, the making of a donation with the express or implied intention that it shall be taken as an extinguishment of some claim which the donee has upon the donor. (See § 1099, and *infra.*)

Where satisfaction arises.

Equitable questions of satisfaction usually arise in three classes of cases:

I. In cases of portions secured by a marriage settlement.

II. In cases of portions given by a will, and an advancement of the donee afterwards in the testator's lifetime.

III. In cases of legacies to creditors. (§ 1109).

Satisfaction resting on presumption may be rebutted.

It is advisable to observe in this place, with reference to all these classes of cases, that where the satisfaction is a matter of presumption, that presumption may be rebutted either by intrinsic evidence derived from the will itself, or from extrinsic evidence, as by declarations of the testator or written papers. (§ 1102.)

I. As to portions secured

I. Where a portion or provision is secured

by settlement.

to a child by a marriage settlement or otherwise, and the parent or person standing *in loco parentis* afterwards by will gives the same child a legacy, without expressly declaring it to be in satisfaction of such portion or provision, in such case, if the legacy is substantially the same in its value, in its nature, in time of payment, and in certainty, and in other respects equally beneficial with the portion or provision, and if it is not given for a different purpose, it will, in the absence of evidence to the contrary, be deemed a full satisfaction, as Courts of Equity now incline against double portions. If the legacy is less in amount than the portion or provision, or if it is payable at a different period, then, (looking to the weight of authority,) it may be deemed a satisfaction *pro tanto*, or in full, according to the circumstances. (§ 1109, 1110, 1104.)

II. As to portions left by will to a child.

II. Where a parent or other person standing *in loco parentis*—that is, a person meaning to stand in the place of a parent as regards providing for a relation's child—bequeaths to his own or such relation's child, a legacy, (not being a residuary legacy, which is always changing in amount,) and afterwards, by an act *inter vivos*, makes a

provision for the same child, of equal or greater amount, of equal certainty, and of the same kind, and in other respects equally beneficial, without expressing it to be in lieu of the legacy, or for other objects than those for which the legacy was given,—in such case, in the absence of evidence to the contrary, it will be deemed a satisfaction or ademption of the legacy. And if the difference in amount is not great, it may be deemed a complete satisfaction or ademption: at all events, in that case it will be deemed an ademption *pro tanto*. (§ 1111 and note, and § 1104.)

No ademption of legacies to strangers.

But this doctrine of the constructive ademption of legacies has never been applied to legacies to mere strangers, unless under some peculiar circumstances; as where the legacy is bequeathed for a particular purpose, and a portion is afterwards given by the testator by an act *inter vivos*, exactly for the same purpose, and for none other. (§ 1117.)

Grounds of the distinction.

The ground of the distinction would seem to be, that a legacy by a parent, or by a person *in loco parentis*, is presumed to be intended as a portion, and that it may be fairly regarded as the utmost amount that

the testator, from a sense of duty, or from natural affection, considered himself able and called upon to spare for the legatee, consistently with the accomplishment of other necessary purposes; and that if he afterwards advances the same amount to the same child, it is almost certain, or, at all events, most likely, that he did so in accomplishment of the same intention of providing for such child to the same extent; especially where the necessity of making a provision has arisen in his lifetime, as when the provision is made on the marriage of the child. But in the case of a legacy to a stranger, the legacy cannot be considered as bearing any definite proportion, in the mind of the testator, to his fortune, and to the other purposes to which he is desirous of devoting that fortune, or, at least, it cannot be regarded as the utmost amount which the testator thought he could spare for the legatee, but is a mere arbitrary gift, unconnected with considerations of duty, or parental or *quasi* parental affection; and there is no less reason, in such cases, why the testator should not choose to make an additional gift, than there was for his making the original gift by his will.

III. As to legacies to creditors.

III. A legacy given to a creditor, if it is of equal amount to the debt, and in other respects equally beneficial, will, in general, in the absence of all countervailing circumstances, be deemed to be a satisfaction of the debt, on the principle that a testator shall be presumed to be just before he is generous. (§ 1119.) But the rule is not allowed to prevail where the legacy is of less amount than the debt, even as a satisfaction *pro tanto;* nor where there is a difference in the time of payment of the debt and of the legacy; nor where they are of a different nature, as to the subject-matter, or as to the interest therein; nor where a particular motive is assigned for the gift; nor where the debt is contracted subsequently to the will; nor where the legacy is contingent or uncertain; nor where there is an express direction in the will for the payment of debts; nor where the bequest is of a residue; nor where the debt is a negotiable security; nor where the debt is on an open and running account. And as to a debt strictly so called, there is no difference whether it is a debt due to a stranger or to a child. (§ 1122.)

On the other hand, where a creditor leaves a legacy to his debtor, and either takes no notice of the debt, or leaves his intention doubtful, Courts of Equity will not deem the legacy as either necessarily or *prima facie*, manifesting an intention to release or extinguish the debt; but they will require some evidence, either on the face of the will, or *aliunde*, to establish such an intention. (§ 1123.) For, if the legacy is less than the debt, it would clearly be a positive injury to the creditor to construe the legacy a release of the debt; and even if the legacy is more than the debt, it does not follow that because the testator has manifested his bounty towards the debtor in that respect, that he intends the debtor to have another benefit which has no necessary connexion with the former. Where the testator does not mention the debt, but gives the debtor a legacy of equal or greater amount, he thereby benefits the debtor to at least the same extent, by giving him the means of paying the debt, as if he had directly released the debt, but had given the debtor nothing, or nothing but the overplus; and his reason for thus giving the debtor the means of paying the

Tit. III. Cap. X.

debt, instead of simply releasing it, may have been one of kind consideration towards the debtor, namely, that none but the executor might be aware of the debt.

CHAPTER XI.

OF PARTITION; OF SETTLEMENT OF BOUNDARIES; AND OF ASSIGNMENT OF DOWER.

SECTION I.

Of Partition.

Jurisdiction.

THE non-existence of any remedy at Common Law, in the case of joint-tenants and tenants in common, until the reign of Hen. 8; and the inadequacy of the remedy afforded by the writ of partition, which subsequently to that period, and until its abolition by the stat. 3 & 4 W. 4. c. 27. s. 36, was available in the case of joint-tenants and tenants in common, as well as of parceners; and the inability of Courts of Law to compel a discovery or to make the requisite compensatory adjustments, together with other circumstances, gave to Equity a general concurrent jurisdiction in cases of partition; so that it was not necessary to state in the bill any peculiar ground of equitable interference. (§ 647, 658.) And now, in consequence of the abolition of the

writ of partition, Equity has an exclusive jurisdiction in these cases.

Mode of partition.

The mode in which relief is administered in Equity, is by first ascertaining the rights of the several parties interested, and then issuing a commission to make the partition; and on the return of the commission and confirmation of the return by the Court, the partition is finally completed by mutual conveyances of the lots made to the several parties. (§ 650.) If the conveyances cannot be executed on account of infancy, or on account of an executory interest, the decree can only put the parties in possession, and secure them in the enjoyment of the parts allotted to them, until effectual conveyances can be made. (§ 652.)

Title must be shown.

As a partition is completed in this way by mutual conveyances, it is essential to show a title; and if there is any thing suspicious in the plaintiff's title, the Court will leave him to Law. (§ 653.)

Partition by or against tenants who have limited interests.

The Court will decree a partition even by or against persons who are only tenants for life or years; and the decree will be binding on all whom they virtually represent, but not on other persons. Thus, a decree by or against a tenant for life, will be binding on

the remainder-man who is not *in esse* at the time, on the ground of virtual representation, after the Master has reported that it will be for the benefit of such remainder-man that the agreement should be carried into effect, either as it stands, or with such variations as he may think fit to suggest. (§ 656, 656 a.)

Equitable adjustments.

The Court will frequently decree a pecuniary compensation to one, in order to make up his share to its proper value, where the estate cannot conveniently be divided into equal parts. (§ 654.) And instead of dividing each of several distinct estates, the whole of one estate is frequently allotted to one person, and the whole of another estate to another person, and a compensation is directed to be made to the person to whom the less valuable estate is allotted. (§ 657.) So a larger share, or a pecuniary compensation will be given to one who has made improvements on the estate. And care will be taken to assign to the parties such portions of the estate as will best accommodate them; and the Court will act according to its own notions of general justice and equity between the parties, and will, if necessary for that purpose, direct a distinct partition of

each of several portions of the estate, or give other special directions to the commissioners, and nominate the commissioners, instead of allowing them to be nominated by the parties. (§ 655, 656, 656 b, c.)

Section II.

Of the Settlement of Boundaries.

General rule.

The general rule now observed by the Court of Chancery is, not to exercise jurisdiction in settling boundaries on the mere ground that they are a subject of controversy, but to require that there should be some superadded equity. (§ 615.)

Confusion through fraud.

Thus, if the confusion of boundaries has been occasioned by fraud, that will constitute a sufficient ground for the interference of the Court. And if the fraud is established, the Court will by commission ascertain the boundaries, if practicable; and if that is not practicable, it will do justice between the parties by assigning reasonable boundaries, and setting out lands of equal value. (§ 619.)

Confusion through fault of a party whose duty it was to preserve the boundaries.

In the next place, there will be a sufficient ground for the jurisdiction, if the confusion has arisen by the negligence or misconduct of

a person standing in such a relation to the opposite party as imposed upon him an obligation to preserve and protect the boundaries. Thus, a tenant or a copyholder is under an implied obligation to preserve them; and if, through his default, there arises a confusion of boundaries, the Court will interfere as against such tenant or copyholder to ascertain and fix them. But even in these cases, it is indispensable to aver, and to establish by proofs, that the boundaries cannot be found without being ascertained under the order of the Court. (§ 620.)

Multiplicity of suits.

A bill will also lie when it will prevent multiplicity of suits. (§ 621.)

Section III.

Of the Assignment of Dower.

Courts of Equity will now exercise a concurrent jurisdiction with Courts of Law in the assignment of Dower in all cases, after the title of the widow, if disputed, has been established by an issue at Law. (§ 624, 626.) There is no difficulty in maintaining this jurisdiction, as a case can scarcely be supposed in which the widow may not either

want a discovery of the title deeds, or of dowable lands, or some other kind of discovery and assistance which it is the peculiar province of the Court of Chancery to afford. (§ 626.)

TITLE IV.

OF PROTECTIVE EQUITY, IRRESPECTIVE OF DISABILITY.

CHAPTER I.

OF PROTECTION FROM LITIGATION OR INJURY, AFFORDED BY THE CANCELLING, DELIVERING UP, AND SECURING OF DOCUMENTS.

I. Voidable instruments, and those which have answered their purpose.

THE Court of Chancery frequently cancels, or rescinds, or orders the delivery up of instruments which have answered the end for which they were created, or of instruments which are voidable. This is done upon the principle, as it is technically called, *quia timet*, that is, for fear that such instruments may be vexatiously or injuriously used, when the evidence to impeach them may be lost or diminished, or that they may throw a cloud or suspicion over the plaintiff's title and interests. (§ 694, 700, 705.)

Void instruments.

But where the illegality of the instrument appears on the face of it, so that its nullity can admit of no doubt, Equity will not interfere; because, in that case, the above-mentioned ground for interference does not exist. (§ 700 a.)

Where an instrument is voidable on account of fraud.

Courts of Equity will generally cancel or rescind instruments, or order them to be delivered up, where there is an actual or

constructive fraud, and the party plaintiff has not participated therein, or is not *in pari delicto*, or where there is a fraud against public policy, and the party plaintiff has participated therein, and is *in pari delicto*, but yet public policy would be more promoted by assisting the plaintiff, than by refusing to assist him. (§ 695.)

Remarks illustrative of the rule.

Where both parties are concerned in an illegal act, it does not always follow that they stand *in pari delicto;* for one party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age; so that his guilt may be far less in degree than that of his associate in the offence. (§ 300.)

Usurious contracts.

In cases of usury, if the lender comes into a Court of Equity, seeking to enforce the contract, the Court will refuse to give any assistance, and will repudiate the contract. But, on the other hand, if the borrower comes into a Court of Equity, seeking relief against the contract, the Court will interfere, although only on the terms that the plaintiff will do equity, by paying the defendant what is really due to him, deducting the usurious interest. (§ 301.) And if the borrower has paid the money, Courts of Equity,

and indeed Courts of Law also, will assist him to recover back the excess beyond principal and lawful interest; for the maxim, *volenti non fit injuria,* does not apply to the borrower, since he cannot be said to have voluntarily paid the usurious interest; and as to being a participator in the offence, he was compelled to submit to the terms which oppression and his necessities imposed on him. (§ 302.)

But relief is not granted where both parties are truly *in pari delicto;* for the maxim is, that *in pari delicto, potior est conditio defendentis et possidentis.* (§ 298, 299.) An exception occurs, however, as already stated, where public policy would thereby be promoted; as in the case of a gaming security, which is void, and money paid on it may be recovered back. (§ 303, 304.)

Gaming securities.

Forged instruments may be decreed to be delivered up without any prior trial at law on the point of forgery. (§ 701.)

Forged instruments.

Assistance will often be given even in regard to unexceptionable instruments. The Court of Chancery will order them to be delivered up to the party entitled to them, if his title to the property to which they relate is not disputed. But where the title

Delivery up of unexceptionable instruments to the party entitled to them.

to the possession of deeds and other writings depends on the validity of the title of the party to the property to which they relate, and he is not in possession of the property, and the evidence of his title to it is in his own power, or it does not depend on the production of the deeds or writings of which he prays the delivery; in such case, he must first establish his title to the property at Law, before he can come into a Court of Equity for a delivery of the deeds. (§ 703.)

Inspection and copies of deeds.

Again, persons having rights and interests in real estate are entitled to come into Chancery for the purpose of having an inspection and copies of the deeds under which they claim title. (§ 704.)

Securing of documents.

And remainder-men and reversioners, and other persons having limited or ulterior interests in real estate, have a right, in many cases, to have the title deeds secured or brought into Chancery for preservation. But this will not be directed, unless it clearly appears that there is danger of a loss or destruction of the instruments in the hands of the persons possessing them; and also that the interest of the plaintiff is not too contingent or too remote to warrant the proceeding. (§ 704.)

Delivery up of securities.

Bonds and notes given by a relation have been ordered to be delivered up by executors or administrators, where it has been fairly inferable, from the conduct of the deceased, that he did not intend that any use should be made of the securities. (See § 705 a.)

CHAPTER II.

OF PROTECTION FROM LITIGATION RESPECTING THE PROPERTY OF ANOTHER, BY MEANS OF INTERPLEADER.

Common law process.

THERE was a process of interpleader at Common Law (§ 801), but it was not allowed in any personal action except debt, for which the action of trover has generally been substituted (§ 804); so that prior to the statute 1 and 2 W. IV. c. 58, the legal process of interpleader fell into entire disuse (§ 805); and although the legal process which was once used has been greatly extended by that statute, yet the jurisdiction in Equity seems to have been left substantially on the old foundation. (§ 823.)

Definition of a bill of interpleader.

A bill of interpleader is one which is filed by a person from whom two or more other persons, whose titles are connected by reason of the one being derived from the other, or of both being derived from a common source, and whose rights he cannot readily determine, have claimed the same thing, wherein he himself claims no inte-

rest, and the object of which is to compel them to contest the matter between themselves, without involving him in any vexatious litigation respecting it. (See § 806 and notes, and § 807, § 814, note, § 816, § 820.)

Illustrations.

Thus, where a tenant is liable to pay rent, but there are several persons claiming title to it, in privity of contract or tenure, he is entitled to file a bill of interpleader to compel them to ascertain to whom the rent is payable. (§ 811.) But if a claim to rent is set up by a mere stranger, under a title paramount, and not in privity of contract or tenure, the tenant cannot compel his landlord to interplead with such a stranger; for the demand made by the latter is not a demand of the same nature or in the same right: the stranger cannot demand the rent, as such, but if he succeeds in an ejectment, he has only a right to damages for use and occupation, whereas the landlord claims the rent, as such, in privity of contract, tenure, and title. (§ 812.)

Connexion between the titles of the two claimants.

Where the title of the one claimant is not derived from that of the other, nor are they both derived from the same common source, but are independent of and adverse to each other, the party holding the property must

defend himself as well as he can at Law; for if a Court of Equity were to exercise jurisdiction in such cases, it would be asserting the right to try mere legal titles, on a controversy between different parties, where there is no privity of contract between them and the third person who calls for an interpleader. (§ 816, 820.)

Principal and agent.

Where the party holding the property is the private agent of one of the claimants, if he were allowed to file such a bill, it would be inconsistent with the maxim, that the possession of the agent is the possession of the principal. And hence, property put into the hands of a private agent by his principal, or received by an agent for his principal, is not the subject of an interpleader, on the assertion of a claim to it by a third person under an independent adverse title; but the agent must deliver it to the principal. And the like doctrine would prevail in favour of a third person to whom the principal, after the bailment, had transferred the right to the property, where the transfer had been recognized and assented to by the agent. (§ 817; 817 a, 818.)

But if the principal has created a lien on the funds, in the hands of the agent, in

favour of a third person, and the nature and extent of the lien is controverted between the principal and such third person; there an interpleader will lie. (§ 817 a.)

It seems essential that the person by whom a bill of interpleader is filed, should be in such a position as to be able to admit the title of either claimant. Thus a sheriff, who seizes goods on execution, cannot maintain a bill of interpleader, on account of the existence of adverse claims to the property; for, as to one of the defendants, he necessarily admits himself to be a wrong doer. (See § 821.)

In order to prevent a bill of interpleader being made the instrument of delay or of collusion with one of the parties, the Courts require that the plaintiff should make an affidavit that there is no collusion between him and any of the other parties; and also, if it is a case of money due by him, that he should bring the money into Court, or at least should offer to do so by the bill. (§ 809.)

CHAPTER III.

OF PROTECTION FROM REPEATED OR RENEWED LITIGATION, OR FROM UNJUST LEGAL PROCEEDINGS, AFFORDED BY DECREES UPON BILLS OF PEACE OR BILLS TO ESTABLISH WILLS, AND BY INJUNCTIONS.

SECTION I.

Of Bills of Peace.

Definition of a bill of peace.

A BILL of Peace is a bill that is filed to establish and perpetuate, in favour of or against a number of persons, some general private right, which, from its nature, is likely to be sought to be established or overthrown by different persons, at different times, and by different actions; or to confirm and perpetuate a right which has been satisfactorily established by two or more trials at Law, but is in danger of being again controverted. (See § 853, 854, 859.)

Ground of interference.

In the former of these classes of cases, Equity interferes in order to prevent multiplicity of suits; in the latter, to prevent oppressive litigation. (Ib.)

An instance of the former class occurs where a bill is filed to settle the amount of a general fine to be paid by all the copyhold tenants of a manor, or to establish a right of common of the freehold tenants of a manor. (§ 856.)

Instance of the first class of bills of peace.

In most cases of this class, it is held that the plaintiff ought to establish his right by a determination of a Court of Law, before he files his bill in Equity. And if he has not done so, and the right he claims has not the sanction of a long possession, and he has any means of trying the matter at Law, a demurrer will hold; for the object of these bills, as their name itself imports, is simply to secure the quiet enjoyment of a right which, *primâ facie* at least, clearly exists, not to decide the question of a doubtful right. If he has not been actually interrupted or dispossessed, so that he has had no opportunity of trying his right, he may file a bill to establish it, and the Court will, if it is necessary, ascertain it by an action or issue at Law, and then make a decree finally binding on all parties. (§ 854, and note.)

Pre-requisites to a bill of peace.

It seems that Courts of Equity, on principles of public policy, will not, on a bill of

Rights in contravention of public rights not

this nature, decree a perpetual injunction for the establishment or the enjoyment of the right of a party who claims in contravention of a public right. (§ 858.)

protected in this way.

SECTION II.

Of Bills to establish Wills.

Jurisdiction in general belongs to the Ecclesiastical Courts, or Courts of Common Law.

THE proper jurisdiction for deciding as to the validity of wills, where they are actually contested, belongs to the Ecclesiastical Court, in the case of personal estate, and to the Courts of Common Law, in the case of real estate. (§ 1445.)

Exceptions, in the case of consent,

Yet the heir at law may come into a Court of Equity for the purpose of having an issue to try the validity of the will, by consent, although not otherwise. And where

and in cases where the question of validity is only preliminary to the giving of equitable relief.

the will is contested, and it is necessary to establish its validity, in order to accomplish purposes which it is the province of Courts of Equity to effect, (such as the execution of trusts, the marshalling of assets, &c.) the latter will exercise jurisdiction in the following manner (§ 1445, 1447, note): where the will is of personal estate, and a probate thereof is produced from the Ecclesiastical Court, but the parties are dissatisfied with

How equity exercises jurisdiction.

the probate, the Court of Equity in which the controversy is depending, will suspend the determination of the cause, in order to enable the parties to try the validity of the will before the proper Ecclesiastical tribunal, and it will then govern itself by the result. If the will is of real estate, the Court will direct an issue to be tried, or an ejectment to be brought at Law, to decide the question of the validity of the will, and will govern its own judgment by the result. If the will is established in either case, a perpetual injunction may be decreed. (§ 1446.) But Courts of Equity will not feel themselves bound by a single verdict, if it is not entirely satisfactory, but will direct new trials, until there is no longer any reasonable ground for doubt. (1447.)

Removal of impediments to a trial at law.

When the heir must resort to a Court of Law to establish the validity of the will, if there are any impediments to the proper trial of the merits on an ejectment, he may come into Equity to have them removed. (§ 1447, note.)

Section III.

Of Injunctions to Restrain Proceedings at Law.

Definition of an injunction.

A WRIT of injunction is a judicial process whereby a party is required to do, or to refrain from doing, a particular thing. (§ 861, 862.)

Common injunctions.

Injunctions to restrain proceedings at Law are either common or special. A common injunction is one that is issued upon and for default of a defendant in not appearing to or answering a bill, in order to restrain him from proceeding at Law touching the matter in the bill, till he shall have fully answered the bill, and cleared his contempt, and the Court shall make other orders to the contrary. It is also granted where the defendant obtains an order for further time to answer, or for a commission commonly called a *dedimus*, to take his answer. This kind of injunction is of course.

Special injunctions.

Injunctions upon other occasions or involving other directions, are called special injunctions. (§ 892.) And the granting or refusing of them is a matter resting in the sound discretion of the Judge. (§ 863.)

Injunctions to restrain proceedings at Law may be granted at any stage of the legal suit. Thus an injunction is sometimes granted to stay trial; sometimes after verdict, to stay judgment; sometimes after judgment, to stay execution; sometimes after execution, to stay the money in the hands of the sheriff, if it is a case of *fieri facias*, or to stay the delivery of possession, if it is a writ of possession. (§ 886.) And there is an almost infinite variety of occasions on which an injunction may issue to stay legal proceedings. (§ 884.)

Injunctions granted at any stage of the legal suit,

and on a variety of occasions.

Bills for an injunction restraining a person from availing himself of a judgment actually obtained at Law, which it would be against conscience to execute, are usually called Bills for a New Trial. (§ 887.) They have not been countenanced much of late years. In general it has been considered that the ground must be such as would be a ground for a bill of review of a decree in Equity on the discovery of new matter. (§ 888.) And Courts of Equity will not relieve against a judgment at Law, where the fact alleged to prove it to be unconscientious for the adverse party to take advantage of the judgment, would have been available as a

Bills for an injunction after judgment.

defence at Law, unless the party against whom judgment was given would have been prevented from availing himself of such fact by fraud or accident, or could not have availed himself of it by any reasonable diligence. (§ 887, 894, 895.)

Injunction not granted against any proceedings not strictly of a civil nature.

The Court of Chancery will not stay proceedings in any criminal matter, or in any cases not strictly of a civil nature, such as proceedings on a mandamus, or an indictment, or an information, or a writ of prohibition, unless the parties who are seeking redress by such proceedings, are also plaintiffs in Equity, proceeding at the same time, in regard to the same matter of right, for redress in the form of a civil suit and of a criminal prosecution. (§ 893.)

Nor even against civil proceedings in all cases.

Nor will the Court grant an injunction against any legal proceedings on the ground of a mistake in pleading or in the conduct of the cause; for he who employs an unskilful person has only himself to blame: nor on the ground of a failure in obtaining fresh evidence, or merely to let in new corroborative proofs; for that would be to keep alive litigation: nor on the ground that a question of Law has been erroneously decided by a Court of Law; for that would be

to constitute the Court of Chancery a Court of Appeal. (See § 897.)

Injunction is addressed to the parties, not to the Court.

In these cases the writ of injunction is not addressed to the Courts in which, or by whose authority, the prohibited proceedings are carried on. It does not affect to interfere with them. It is directed only to the parties, prohibiting them from making an unfair use of the proceedings of a Court of Law. (§ 895.)

Injunction against a suit in a foreign country.

On similar principles, where both the parties to a suit in a foreign country are residing within another country, the courts of the latter country have full authority to act on them, whether by injunction or otherwise, with regard to such suits; because they can act on the parties *in personam*, without presuming to direct or control the foreign Court. (§ 899.)

CHAPTER IV.

OF PROTECTION FROM LOSS OR INJURY, IN OTHER CASES, BY INJUNCTION.

Origin of the jurisdiction.

THE jurisdiction of Courts of Equity in granting injunctions has arisen either from the want of any legal remedy, or from the imperfection and inadequacy of the legal remedy in cases where any such remedy exists. (§ 864.)

Injunctions are either temporary or perpetual;

Injunctions, when granted on bills, are either temporary, as until the coming in of the defendant's answer, or until the further order of the Court, or until the hearing of the cause, or until the coming in of the report of a Master; or they are perpetual, as when they form a part of the decree after the hearing, and amount to a perpetual prohibition. (§ 873.)

total, or partial; qualified, or unconditional; preventive, or restorative.

Injunctions may be also either total or partial, qualified or unconditional. (§ 886.) And some are of a preventive, others of a restorative character. The former are the most common. (§ 862.)

Injunction must be prayed for.

An injunction will not be granted, unless

specially prayed for by the bill; because the defendant might make a different case by his answer against the general words of the bill, from what he would make against the special prayer for an injunction. (§ 863.)

Equity will not limit its power of granting injunctions.

Courts of Equity constantly decline laying down any rule which shall limit their power and discretion as to the particular cases in which injunctions shall be granted or withheld. (§ 959.) And it would seem, that unless some special reason intervenes, they will in all cases grant an injunction to protect their own officers who execute their process, against any suit brought against them for acts done under or by virtue of such process (§ 891); and to restrain persons from making an unfair use of a Court of Law, which we have considered in the preceding Chapter; and to prevent any one from prejudicing another, contrary to equity and good conscience; so that it would appear to be only needful to advert to a few specific cases presenting points which are not of a sufficiently obvious character to be omitted.

General rule as to cases where they *will* be granted.

Some specific cases pointed out.

I. An injunction will be granted to restrain permissive waste as well as voluntary waste. (§ 917.)

I. Waste, permissive or voluntary.

Equitable waste.

And the Court of Chancery will sometimes interfere with respect to what is commonly, although with no great propriety, called equitable waste (§ 912); that is, such destructive or injurious acts as would not be punishable as waste at Law, because consistent with the legal rights of the party committing them, but which are considered as waste, and as unjustifiable, in the view of a Court of Equity, as occasioning an unconscientious and irreparable injury to the interests of the other parties (see § 915); as where a tenant for life without impeachment of waste, or a tenant in tail after possibility of issue extinct, pulls down houses, or cuts down trees planted for the ornament and shelter of the premises. (§ 915.)

Waste in the case of tenants in common, coparceners, and joint-tenants.

On similar grounds, although in general the Court will not interfere by injunction to prevent waste in cases of tenants in common, or coparceners, or joint tenants, because they have a right to enjoy the estate as they please, and because they can make partition when they choose, so as to prevent future waste; yet the Court will interfere in special cases, as where the waste is destructive of the estate, and not within

the usual legitimate exercise of the right of enjoying the estate. (§ 916, and see § 909, note.)

II. Public nuisances.

II. In the case of public nuisances, an information lies in Equity to redress the grievance by way of injunction. (§ 923.) In regard to private nuisances, in order to justify the interposition of a Court of Equity, there must be such an injury, as, from its nature, is not susceptible of being adequately compensated by damages at Law, or such as from its continuance must occasion a constantly recurring grievance, which cannot be prevented otherwise than by an injunction. (§ 925.)

Private nuisances.

III. Patents.

III. The Court of Chancery frequently interferes in cases of patents for inventions. (§ 930.) If the patent has been recently granted, and its validity has not been ascertained by a trial at Law, and the defendant denies it, or puts the matter in doubt, there, in general, the Court will not grant an immediate injunction, but will require the validity of the patent to be ascertained in a Court of Law, retaining the bill in the mean time. But if the patent has been granted some length of time, and the patentee has put the invention into public use, and has had an exclusive posses-

sion of it under his patent for such a period of time that there is a fair ground for presuming that he has an exclusive right, the Court will ordinarily interfere by way of preliminary injunction, pending the proceedings; reserving, of course, to the ultimate decision of the cause, its own final judgment on the merits. (§ 934 and note.) And an injunction will be granted after the time limited for the expiration of a patent, to restrain the sale of articles manufactured in violation of the patent, while it was in force. (§ 934.)

IV. Copyrights.

IV. Courts of Equity often afford protection to copyrights, and act upon similar principles with respect to the title. (§ 935.)

If a work is of a clearly irreligious, immoral, libellous, or obscene character, they will not protect it. (§ 936.)

It is not an infringement of the copyright of a book to make *bonâ fide* quotations or extracts from it, or a *bonâ fide* abridgment of it, or to make a *bonâ fide* use of the same common matter in the compilation of another work. (§ 939.) Notwithstanding a work contains matter borrowed from another book, it is not an infringement of the copyright of that book, if that fact is duly acknowledged, and if, in the main, when

compared with that book, it deserves the character of a new work, either in all its parts, or in that part or those parts which contain the whole of the matter so borrowed; whether such newness of character consists in an adequate intermixture and incorporation of fresh ideas, or in presenting the same ideas, for some apparent, adequate reason, in a condensed or otherwise materially different form. It often happens that a writer who has great originality of conception, expresses his thoughts in a very faulty style. The talent which produces original ideas is totally different from that which presents those ideas to the mind of the reader in the best possible form. And perhaps talent of the latter kind is as important, and it frequently demands the exercise of as high an order of mental faculties, as the talent of original conception. And if one writer exhibits the sentiments or points in another's work in a more condensed or in a more developed form, as the case may require, and in a more precise, methodical, and perspicuous manner, or otherwise in a more just and accurate mode, according to the nature of the subject, he may be conferring a very great benefit on the public, and his labours may justly be

said to deserve the character of a new work, even though he may contribute no original matter whatever. But in each of the descriptions of new works above noticed, unless the writer acknowledges the source from which he derived the ideas so intermixed and incorporated with fresh matter, or clothed in different language, or presented in an essentially different mode, the new work, though it may possess very great merits of its own, yet amounts to a piece of most despicable plagiarism, if not to a fraud in the view of a Court of Equity, and an infringement of copyright. (Upon this subject, see § 939—942 and notes.)

V. Letters.

V. Courts of Equity will also restrain the publication of private letters, whether of a literary character or otherwise, where the publication is attempted without the consent of the author. The property which the receiver has in letters is of a qualified kind; for the property, beyond the purpose for which the latter is sent, is in the sender. To permit the receiver to publish letters of a literary character, would be allowing him to sell or give away that which belonged and may be of value to another: and to permit the receiver to publish letters of other

kinds, would be allowing a practice which must prove most prejudicial to the interests of society. (944—948.)

Courts of Equity effectuate their own decrees in many cases, by enjoining parties to yield up, deliver, quit, or continue the possession, and by following up such injunction by a writ of assistance. (§ 959.)

CHAPTER V.

OF PROTECTION FROM ANOTHER'S ABSCONDMENT, BY THE WRIT OF NE EXEAT REGNO; AND OF PROTECTION BY THE WRIT OF SUPPLICAVIT.

1. Writ of *ne exeat regno.*

I. THE writ of *ne exeat regno* is a prerogative writ which is issued to prevent a person from leaving the realm. (§ 1465.)

Original and present uses thereof.

It was originally applied only to great political purposes. (§ 1467.) And although it is now applied in certain cases by custom to private civil matters only, yet it is employed with great caution and jealousy, (§ 1468,) after a bill filed. (§ 1467, note.)

This writ will not be granted, except in cases of equitable debts and claims; for, in regard to civil rights, it is treated in the nature of an equitable bail. (§ 1470.)

To this, however, there are two exceptions: 1. Where alimony has been actually decreed by the Ecclesiastial Court, and no appeal is made against the decree, the writ is granted, unless the husband makes it appear that he does not intend to leave

the kingdom; because the Ecclesiastical Courts cannot take bail, or because they are unable to furnish a complete remedy to enforce the due payment of alimony. (§ 1471 and note, and § 1472.) 2. Where there is an admitted balance due from the defendant to the plaintiff, but a larger sum is claimed by the latter, the writ will be issued. (§ 1473.)

The equitable demand for which the writ will be issued, must be certain in its nature, of a pecuniary character, and actually payable, and not contingent. (§ 1474.)

II. Writ of *supplicavit*.

II. The writ of *supplicavit* is in the nature of the process at the Common Law to find sureties of the peace, on articles filed by a party; as by a wife against her husband. It is rarely used now, as the remedy at Common Law is adequate for the purpose. (§ 1476.)

CHAPTER VI.

OF THE PROTECTION OF PROPERTY, BY TAKING AWAY THE POSSESSION OR RECEIPT THEREOF, OR BY REQUIRING SECURITY.

I. Appointment of a receiver.

I. The Court of Chancery very frequently prevents anticipated wrong or loss, by the appointment of a receiver to receive rents and other income or profits. (§. 826.)

Nature of his office and possession.

A receiver so appointed is treated as virtually an officer and representative of the Court, for the more speedy getting in of such rents, income, or profits, and the securing the same for the benefit of the person entitled to it. In the case of adverse claims, the appointment of a receiver does not at all affect the right. The Court virtually becomes the landlord *pro hac vice*, and the receiver, as the officer of the Court, is generally entitled to the possession; and his possession is treated as the possession of the Court, in the first instance, and then of the party who ultimately establishes his right to it; and, therefore, it is not to be

disturbed, even by an ejectment under an adverse title, without the leave of the Court. (§ 831, 833, 833 a.)

His power.

The receiver cannot proceed in any ejectment against the tenant, except by the authority of the Court. (§ 833.) And when in possession, he has very little discretion allowed him, but must apply from time to time to the Court for authority to do such acts as may be beneficial to the estate. (§ 833 a.)

II. Payment into Court, or to the party entitled, or security.

II. In other cases, the Court affords protection by an order to pay a fund into Court; in others, by directing security to be given, or money to be paid over. (§ 826.)

III. Delivery of chattels

III. The Court will not ordinarily entertain bills for the specific delivery of chattels. But where the chattel is of such a nature that the loss of it could not be fully compensated by damages, the Court will decree a specific delivery thereof. (§ 708, 709.)

TITLE V.

OF PROTECTIVE EQUITY, IN FAVOUR OF PERSONS UNDER DISABILITY.

CHAPTER I.

OF INFANTS.

THE care of infants, as persons who are not able to protect themselves, belongs to the Sovereign, as *parens patriæ;* and the correct opinion seems to be, that this prerogative was delegated to the Court of Chancery from its first establishment; and that the jurisdiction does not belong to the Lord Chancellor only, in virtue of his general power as holder of the great seal and as keeper of the Royal conscience (§ 1333—1337, and notes), since the jurisdiction may be exercised as well by the Master of the Rolls, as by the Chancellor, and since an appeal lies, as in other cases, in which the Court of Chancery has a general jurisdiction, from the decision of the Court of Chancery to the House of Lords. (§ 1364, note.) Jurisdiction.

The Court of Chancery will appoint a suitable guardian to an infant, where there is no other, or no other who will or can act, at least where the infant has property. If the infant has no property, the Court, Appointment of guardians.

perhaps, will not interfere; not from want of jurisdiction, but because it cannot exercise its jurisdiction usefully, without having the means of applying property for the benefit of the infant. Guardians appointed by the Court are considered as officers of the Court, and are held responsible to it accordingly. (§ 1388.)

Removal of guardians.

The Court will remove a guardian of any kind, whenever sufficient cause can be shown

Control over them.

for such a purpose, or will regulate and direct the conduct of the guardian in regard to the custody and education and maintenance of the infant, and, if necessary, will even appoint the school where he shall be educated, and will require security to be given, if there is any danger of injury to his person or property. (§ 1339.)

Assistance of guardians.

The Court will also assist guardians in compelling their wards to go to the school selected by the guardian, as well as in obtaining the custody of the persons of their wards, when they are detained from them. And this may be done on a petition. (§ 1340.)

Removal of children from their parents.

In general, parents are entrusted with the custody of the persons and the education of their children, on the natural presumption

that the children will be properly treated, and that due care will be taken of them, in regard to learning, morals, and religion. But whenever this presumption is negatived by the actual state of the case, and a father is guilty of gross ill-treatment of his infant child, or is living in gross immorality or avowed impiety, or he otherwise acts in a manner injurious to the morals or interests of his children, the Court of Chancery will deprive him of the custody of his children, and appoint a suitable person to act as guardian. (§ 1341.)

Conversion of the infant's property.

Guardians may change the nature of the property, when it is manifestly for the benefit of the infant, but not otherwise; for, although it has been said that there is no Equity in such a case between the representatives of the infant; nevertheless for the purpose of preventing any such acts of the guardian, in case of the death of the infant before he comes of age, from changing improperly, through partiality or otherwise, the rights of the parties, who, as heirs or distributees, would otherwise be entitled to the property, Courts of Equity hold lands purchased by the guardian with the infant's personal estate, or with the rents and profits of his

real estate, to be personalty, and distributable as such; and on the other hand, they treat the proceeds arising from the sale of real property, (as, for example, of timber cut down on a fee-simple estate of the infant,) as real estate. It is common for guardians to ask the sanction of the Court to any acts of this sort; and when the Court directs any such change of property, it directs the new investment to be in trust for the benefit of those who would be entitled to it, if it had remained in its original state. (§ 1357.)

Who are wards of Chancery.

Sometimes infants become wards of Chancery. Properly speaking, a ward of Chancery is a person who is under a guardian appointed by the Court of Chancery. But whenever a suit is instituted in that Court, relating to the person or property of an infant, although he is not under any general guardian appointed by the Court, he is treated as a ward of the Court. (§ 1352.)

All acts affecting them must be done under the direction of the Court.

Any act affecting the person or state or property of a ward of Chancery, unless done under the express or implied direction of the Court, is treated as a violation of the authority of the Court; and the offending party will be arrested for the contempt, and

compelled to submit to such order, and to such punishment by imprisonment, as are applied to other cases of contempt. (§ 1353.)

Maintenance.

Whenever an infant is a ward of the Court, and a suit is depending in the Court, the Court will of course on petition direct a suitable maintenance for the infant, having a due regard to his rank, intended profession or employment, property, and expectations. (§ 1354.) And the same will now be done in ordinary cases where the infant is not a ward of the Court, and he has no father, or his father is unable to maintain him, at least where the property is small. (See § 1354, 1354 a.)

The Court is governed by a regard to the circumstances and state of the family to which the infant belongs, in respect to the allowance of any maintenance at all, and to the amount of such allowance. Thus, if the father is able to maintain the infant out of his own property, the Court will ordinarily withhold all allowance from the property or income of the infant for the maintenance of the latter, even though there may be a power in the settlement, as distinguished from a trust, at the discretion of the trustees, to appoint part of the income for the

purpose of his maintenance and education. (§ 1354 a, and note.) On the other hand, if the infant is an eldest son, and the younger children have no provision made for them, an ample allowance will be decreed to the infant, so that the younger children may be maintained. And the Court will act in a similar way where the father or mother of the infant is in distress or narrow circumstances. (§ 1355.)

The Court, however, in allowing maintenance, usually confines it within the income of the property. But where the property is small, and more means are necessary for the due maintenance of the infant, the Court will sometimes allow part of the capital to be applied for the purpose. But without the express sanction of the Court, a trustee or guardian will not be justified in so applying any part of the capital. (§ 1355.)

Marriage of a ward of the court, without its consent.

If a man should marry a ward of the Court, without the consent of the Court, even though with the consent of the guardian, he, and all others concerned in aiding and abetting the act, will be treated as guilty of a contempt of court; and even though he was ignorant that she was a ward

of the Court, he will be deemed guilty of a contempt. (§ 1358.)

Recognizance that a ward of Court shall not marry.

Where the Court appoints a guardian, or committee in the nature of a guardian, to have the care of an infant, it is accustomed to require the guardian or committee to give a recognizance that the infant shall not marry without the leave of the Court; so that if the infant should marry even without the knowledge or neglect of the guardian or committee, yet the recognizance would in strictness be forfeited, whatever favour the Court might think fit to show to the party, when he should appear to have been in no fault. (§ 1359.)

Interdiction of intended marriage of a ward of Court, and of addresses.

Where there is reason to suspect an improvident marriage without its sanction, the Court will, by an injunction, not only interdict the marriage, but also all communications between the ward and the admirer; and if the guardian is suspected of any connivance, the Court will substitute a committee in his stead. (§ 1360.)

Settlement on a ward of Court.

In case of an offer to marry a ward, the Court will refer it to a Master to ascertain and report whether the match is a suitable one, and what settlement ought to be made. And when a man has been committed for

a contempt in marrying a ward of Court without its sanction, he will not be discharged until he has actually made such a settlement as, on a reference to a Master, shall be deemed proper. And this will be the case even where the ward has subsequently come of age, and is ready to waive her right to a settlement; for the Court will protect her against her own indiscretion and the undue influence of her husband. (§ 1361.)

Statutes 1 W. 4, c. 60, 65.

The statutes 1 W. IV. c. 60 and 65, give the Court of Chancery additional powers in certain cases of infancy. But these enactments do not belong to the subject of Equity Jurisprudence, but to the Statutory Jurisdiction of the Court of Chancery.

CHAPTER II.

OF PERSONS OF UNSOUND MIND.

Jurisdiction.

THE Sovereign, as *parens patriæ*, had, from the first, the care of idiots and lunatics who had no other guardian. But the statute 7 Ed. II. c. 9, or some early statute, besides giving the King the custody of idiots, also vested in him the profits of the idiot's lands during his life, as a beneficial interest. And with respect to lunatics, the statute 17 Ed. II. c. 10, enacted, that the King should provide that their lands and tenements should be kept without waste; which makes him a trustee for them. Thus, the Crown has both general authority as *parens patriæ*, and a specific authority, and, in the case of idiots, a beneficial interest also, vested in it by statute. And as the Chancellor is the person by whom the Crown exercises its powers, he acts in a twofold capacity; in some respects, under the special warrant, by the sign manual, in exercise of the right and power conferred by the statute; in others, as keeper of the Royal conscience, and dele-

gate of the Crown, in its character of *parens patriæ*. The warrant gives to the Chancellor the right of providing for the maintenance of idiots and lunatics, and for the care of their persons and estates, and no more. But the Chancellor is in the habit of making many orders, and enforcing them by attachment; which orders, and the manner of enforcing them, are not warranted by the sign manual, but are warranted by the general power of the Court. Yet the Chancellor does not act as an Equity Judge, as administering the general powers of a Court of Equity, when he makes these orders and enforces them by attachment; for if he did, an appeal would lie to the House of Lords (see § 1336, 1363, 1364, and note); whereas, although from a decree made on a bill filed relating to a lunatic's estate, in the regular course of Equity Jurisprudence, an appeal lies to the House of Lords, yet an appeal from an order made on motion or petition in lunacy lies to the Judicial Committee of the Privy Council. (Macqueen's Appellate Jurisdiction, p. 99, 754, 752, &c.) The Chancellor, in making such orders and decrees, and enforcing them, acts merely by virtue of his general power as keeper of the

Queen's conscience, and delegate of the Crown, but as he exercises this authority when sitting in the Court of Chancery, he is clothed with the general power of the Court.

The jurisdiction extends not only to idiots and lunatics, properly so called, but also to all persons who, from age or other misfortune, are incapable of managing their own affairs, and therefore are properly deemed of unsound mind or *non compotes mentis*. (§ 1365.)

Transactions with persons of unsound mind.

Some observations have already been made on transactions with such persons, in the Chapter on Actual Frauds.

Stat. 1 W. 4, c. 60, 65.

The statutes 1 W. IV. c. 60, 65, give the Lord Chancellor additional powers in certain cases of lunacy, but these enactments do not belong to the subject of Equity Jurisprudence.

CHAPTER III.

OF MARRIED WOMEN.

Common law doctrine.

AT the Common Law, the person of the wife, for almost all purposes, is considered as merged in the person of the husband. (See § 1367.) But Courts of Equity, in many respects, treat husband and wife as distinct persons. (§ 1368.)

Division of the subject of the doctrines of equity as to married women.

In illustration of this, let us consider,

I. The powers which they have, in Equity, of contracting with, and giving and granting to, each other.

II. The wife's pin money and paraphernalia.

III. The wife's separate estate.

IV. The equity of the wife to a settlement or maintenance out of her own property.

V. Some points respecting deeds of separation.

SECTION I.

The Powers which Husband and Wife have, in Equity, of Contracting with, and Giving and Granting to, each other.

I. Contracts

I. At Law, contracts made between husband

and wife before marriage, are extinguished by the marriage, if they are for debts or things due *in præsenti*, or at, or on a future time or event which may occur during, and not after the determination of, the coverture. But Courts of Equity, although they generally follow the same doctrine, will enforce such contracts, where it would be in furtherance of the manifest intention and object of the parties to do so; as in the case of an agreement by husband and wife for the mutual settlement of their estate, or of the estate of either of them on the other, on the marriage, even without the intervention of trustees. (§ 1370, 1371.)

before marriage.

II. Contracts made between husband and wife after marriage, are a mere nullity at Law; but, under particular circumstances, they will be enforced in Equity, where they are of a reasonable nature. (See § 1372.) So the wife may even become a creditor of her husband, and her rights as such will be enforced against him and his representatives. (§ 1373.)

II. Contracts after marriage.

III. Gifts and grants too, whether express or implied, by a husband to his wife, after marriage, although ordinarily void at Law, will be enforced in Equity, if they are of a

III. Gifts and grants after marriage.

reasonable nature, and there is no ground to suspect fraud. (See § 1374, 1375.)

Section II.

Pin-Money and Paraphernalia.

I. Pin-money.

I. Pin-money is not deemed to be an absolute gift: it is not considered like money set apart for the sole and separate use of the

Definition thereof.

wife during coverture; but it is a sum payable by the husband to the wife, in virtue of a particular arrangement, and to be applied by the wife in attiring her person in a manner suitable to the rank of her husband, and in defraying other personal expenses—a sum allowed to save the trouble of a constant recourse by the wife to the husband, in order to meet her ordinary personal expenses. (See § 1375 a, and note.)

Arrears thereof.

Such being the peculiar nature of this provision, Courts of Equity refuse to call upon the husband to pay beyond the arrears of a year, although stipulated for by a marriage settlement. For, setting aside the presumed satisfaction by acquiescence, the money is meant to dress the wife during the year, so as to keep up the dignity of the husband, and not for the purpose of accumulation.

And, on the same principles, the personal representatives of the wife are not allowed to make any claim even for arrears of a year. (§ 1375 a, and note.)

II. The wife's paraphernalia are the personal apparel and ornaments of the wife, suitable to her rank and condition in life. (§ 1376.)

II. Paraphernalia. Definition thereof.

At Law, the husband may, in his lifetime, but not by his will, dispose of the wife's paraphernalia; except indeed, her necessary apparel. And they are liable to the claims of creditors, with the like exception. And if the articles were given by the husband, either before or after marriage, Courts of Equity fully recognize this right of the husband and his creditors, instead of treating the articles as absolute gifts to the wife, as her own separate property; although, in the case of creditors claiming against the assets of the husband, the personal assets of the husband will be marshalled against his representatives, in favour of the widow. But if the articles were bestowed on the wife by any one else, they would be deemed absolute gifts to her separate use; and then, if received with the consent of the husband, neither he nor his creditors can dispose of them. (§ 1376, 1377.)

Rule of law respecting them.

Rule of equity, where they were given by the husband;

where given by any one else.

SECTION III.

The Wife's separate Estate.

I. Means of acquiring it.

I. With regard to the means of acquiring a separate estate.

1. By gift, grant, devise, or settlement.

1. Whenever real or personal estate is given, granted, or devised to, or settled on, a woman, either with or without the intervention of trustees, whether after marriage, or as a provision for marriage, or not in contemplation of immediate marriage, and whether by her husband, or by a mere stranger, the husband will in Equity be held to be a mere trustee for her, if it appears, beyond any reasonable doubt, that the property was intended for her separate use. (§ 1380, 1381, 1384.) Thus, a bequest to a married woman "for her own use, and at her own disposal," has been held to be a bequest to her separate use. (§ 1382.) But where a bequest has been made "for her own use and benefit," it has been held, that although the money is to be for her own use, yet there is nothing in that, inconsistent with its being subject to the husband's marital rights. (§ 1383.)

2. By carrying on a

2. By the custom of London, a married

woman may carry on trade within the City, as a sole trader, and be liable as such. But, independently of any such custom, if it is agreed between the husband and wife, before marriage, that the wife shall be allowed to carry on a separate trade, such an agreement will be maintained at Law against the husband; and, being an agreement for valuable consideration, namely, that of the intended marriage, it will also be maintained at Law against his creditors, in case trustees are interposed. And if such an agreement is made after marriage, and trustees are interposed, it will be maintained at Law against the husband; and, if it is on valuable consideration, against his creditors also; for, in such case, the wife's trustees will, at Law, be entitled to the property assigned, and to the increase and profits thereof, and she will be considered, at Law, as their agent, and her possession as their possession. The trustees, however, will be regarded, in Equity, as holding such property, and receiving the increase and profits thereof, for the sole and separate use of the wife. And thus, in such cases, where trustees are interposed, the beneficial interest in the property, and the increase and profits thereof,

separate trade in London; or even elsewhere, by agreement before marriage;

by agreement after marriage;

are secured to the wife by the joint operation of Law and Equity. By the operation of Law, the legal estate is vested in the trustees, and taken out of the power of the husband. By the operation of Equity, the beneficial interest is vested in, and secured to, the wife, against her husband, and, if the agreement is for valuable consideration, against his creditors also. But even where there are no trustees interposed, such an agreement has the force, in Equity, of creating a separate estate for the wife, and securing it against the husband, and, if the agreement is prenuptial, or otherwise for valuable consideration, against his creditors also. And this is the case even though it be a mere implied agreement. So that if the husband should permit his wife, after the marriage, to carry on business on her sole and separate account, all her earnings in the trade will be her separate property. And if a husband should desert his wife, and she should be enabled, by the aid of her friends, to carry on a separate trade, her earnings in such trade will be enforced in Equity against her husband. (See § 1385—1387.)

even though the agreement be merely implied.

Where the property is vested in trustees, care must be taken that the negotiations are

not carried on in the name of the wife, as by taking notes or other securities in her name; for then they will, at Law, be held to belong to the husband, although it will be otherwise in Equity. (§ 1386.)

II. Wife's power of disposing of separate estate, where it has arisen from a prenuptial agreement.

II. As to the wife's power of disposing of her separate estate, all prenuptial agreements for securing to the wife separate property, real or personal, will confer on her, in Equity, unless the contrary be expressly stipulated or implied, the same power of disposing of such separate property, by will or otherwise, as an unmarried woman would have. (§ 1390.)

Where it has arisen from a postnuptial agreement of the husband.

With respect to her power of disposing of her separate property, where no trustee is interposed, and it rests merely on a postnuptial agreement of the husband, if the property is personal, her disposal thereof can affect her husband's rights alone; and therefore his assent is conclusive upon him. But if the property is real, she can only dispose of it by the ordinary means by which married women dispose of their real property; because, in regard to real estate, her own heirs are or may be affected in their interest by descent. (§ 1391.)

Where it is given by a third person during the coverture.

And where real estate is given by a third person to a married woman, during the coverture, for her separate use, she will not be able to dispose of it, except by these means, unless the power of disposing of it during the coverture is expressly given her. But if such a power is expressly given her, she may dispose of the estate, even though there are no trustees interposed to protect the execution of the power. (§ 1392.)

Where personal property, and the income of real property, are given by a third person, for the separate use of a married woman, she has, in effect, a full power to dispose of it, unless, from the words of the gift, it appears, beyond a reasonable doubt, to have been the intention of the giver that this absolute power should not exist. (See § 1393.)

Restrictions against alienation or anticipation.

A gift to a woman for her separate use may be accompanied by restrictions against alienation or anticipation. (§ 1382 a, 1384.)

Gifts to the husband by the wife.

Where the wife bestows her separate property upon her husband, Courts of Equity examine the transaction with an anxious dread; and if they are required to give sanction or effect to it, they will examine

the wife in Court, and adopt other precautions to ascertain her unbiassed wishes. (§ 1395.)

Husband's receipt of the income.

Where the husband, with the consent of the wife, is in the habit of receiving the income of her separate estate, it is regarded as showing her voluntary choice thus to dispose of it for the benefit of the family; and he will not ordinarily be required to account for it, beyond the income received during the then last year. (§ 1396.)

III. Wife's liability.

III. As to the liability of the wife's separate estate to her contracts, debts, and charges.

At Law, a woman cannot render herself or her property liable for any contract, debt, or other charge created by her during the coverture, not even for necessaries. And in Equity she cannot bind her person at all, or her property generally, but she may bind her separate property. (§ 1397 and note, and § 1400, note.) This will be held liable for all the debts, charges, and incumbrances, which she expressly charges, or which, judging from the nature thereof, it may be fairly inferred that she intended to charge on her separate estate. And hence, if she gives a promissory note, or an acceptance, or a bond

to pay her own debt, or if she joins in a bond with her husband to pay his debts, without reference to her separate estate, it shall be intended as an application *pro tanto* of her separate estate; because the security must have been executed with the intention that it should operate in some way, and it can have no operation except as against her separate estate. And if she employs a lawyer, her separate estate will be liable, from the nature of the engagement. But it would seem that her separate estate would not be liable for debts of an ordinary character, for which she gives no security, unless, at least, she is divorced and living apart from her husband. For she may, and in general must, be presumed to have intended that these should be paid by her husband. If, indeed, the contrary doctrine were held, a wife who has a separate estate, would, in many cases, be disinclined to take upon herself her ordinary domestic duties, fearing lest her separate estate should be exhausted by defraying the ordinary expenses of the house; or the creation of a separate estate, would often be rendered unavailing, by her encountering that risk. (See § 1399, 1400, 1401, and notes.)

SECTION IV.

The Wife's Equity to a Settlement or Maintenance out of her own Property.

I. Equity of the wife, when defendant, against her husband. General rule.

I. If the wife has absolute personal property (with the exception, perhaps, of a term for years) which cannot be reduced into the possession of the husband without a suit in Equity, (as where the legal property is vested in trustees,) and the husband applies to a Court of Equity for the purpose of reducing the property into his possession; the Court, acting upon the maxim that he who seeks Equity must do Equity, will not give it up to him, without requiring him to make a suitable settlement on the wife of a part of the property, or of some other property, for her due maintenance in case of her surviving him (§ 1404, 1405, 1410, 1418), with a provision for the issue of the marriage (§ 1406), unless the wife and child are already amply provided for under a prior settlement (§ 1416), or the right to a settlement is waived or lost. (§ 1418, 1419, *infra.*) And this equity of the wife is now extended to the rents and profits of the real estate in which she has a life interest, although it

does not generally extend to equitable interests in which she has a life estate only. (§ 1408.)

Injunction against proceedings in other courts.

When legacies to the wife are sued for by the husband in the Ecclesiastical Courts, an injunction will be granted for the purpose of enforcing the wife's equity to a settlement. And there are instances in which, for the purpose of enforcing the wife's equity to a settlement, bills in Equity have been entertained to restrain the husband from having recourse to his remedy in a Court of Common Law to reduce his wife's *choses in action* into possession. (§ 1403.)

Refusal of the husband to make a settlement.

If the husband does not choose to make a settlement or provision for the wife, the Court will not ordinarily take from him the income and interest of his wife's fortune, so long as he is willing to live with and maintain her, and there is no reason for their living apart. The most the Court will do, under such circumstances, is to secure the fund, so as to give her the chance of taking it by survivorship, allowing the husband, under its order, to receive the income and interest. (§ 1415.)

II. Equity of the wife,

II. The assignees in bankruptcy or insol-

when defendant, as against her husband's assignees or vendees.

General rules.

vency of a husband, and also his assignees for payment of debts due to his creditors generally, are bound to make a settlement on the wife out of her immediate *choses in action* and immediate absolute equitable interests in chattels personal assigned to them, in the same way, and under the same circumstances, as he would be bound to make one; for it is a general principle that such assignees take the property subject to all the equities which affect the bankrupt or insolvent, or general assignor. Such assignees also take the property subject to the wife's right of survivorship, in case the husband dies before the assignees have reduced her *choses in action* and equitable interests into possession. (§ 1411, 1421.) And even a specific assignee or purchaser from the husband, for valuable consideration, of her *choses in action* and equitable interests, is bound to make such a settlement. (§ 1412.)

There are two important distinctions, however, between the husband himself and his specific assignees for valuable consideration, on the one hand, and his assignees in bankruptcy or insolvency, or assignees for

payment of debts generally, on the other hand.

When an immediate provision is required.

First, in the case of the former, it is only necessary that the provision for the wife should commence from the death of her husband. But in the case of the latter, it is necessary that the provision should commence immediately, because the general assignment of his property renders him incapable for a time, and perhaps for ever, of affording her a suitable support. (§ 1421.)

Secondly, in the case of the former, the wife has no equity to a settlement out of equitable interests for life, unless the husband has deserted or ill treated her, or refused to maintain her. But in the case of the latter she has such an equity (§ 1412, and 1408 note, and § 1424); because the general assignment deprives her of a due maintenance, even in her husband's lifetime; whereas, in the other instance, she has a maintenance during her husband's lifetime; and she may not live beyond that period; and since her issue are not interested after her death, as they are in cases where she has the absolute interest, there is only her own chance of survivorship to be thought

of; and the loss of that may be more than compensated by the benefit, or perhaps relief from difficulties, which she and her husband may obtain by means of reducing the property into possession, or disposing thereof for valuable consideration.

Where the whole fund is required to be settled.

And there is a distinction between cases where the husband has become insolvent and has taken the benefit of the Insolvent Act, which discharges his person, but not his future effects, and cases where he has been discharged under the bankrupt law, under such circumstances that his future effects are not liable. In the former case, Courts of Equity will decree the income of the *whole* fund to be applied primarily to the maintenance of the wife during her lifetime, and, after her death, the principal to be divided among the children; because it appears that the husband must remain for a time, and perhaps for ever, without funds to maintain his wife; whereas it is otherwise in the case of a complete discharge under the Bankrupt Law. (§ 1421 a.)

Refusal of the assignees to make a settlement.

If the assignees in bankruptcy, or other general assignees claiming title under the husband, refuse to make a settlement on the wife, the like doctrine applies to them, as to

the husband himself where he refuses to make a settlement. (§ 1415. *Supra*, p. 290.)

Terms for years.

It is said, that if the husband, for valuable consideration, assigns a term for years held in trust for his wife, the wife will not have any claim against his assignee. This seems to be an anomalous exception. It has even been declared that the husband, by his assignment of the reversionary interest in a term for years held in trust for the wife, may bind such interest, so as to deprive her of her equity, because the husband may dispose of the wife's contingent reversionary legal interest in a term for years. (§ 1410.)

Reversionary *choses in action*, and reversionary equitable interests in personal chattels.

But if the husband assigns his wife's reversionary *choses in action* and other reversionary equitable interests in personal chattels, such assignment will not exclude her right of survivorship, although she join in the assignment, because the assignment, from the nature of the thing, cannot amount to a reduction into possession of such reversionary interest. (§ 1413.) And as to the consent of the wife, although it may be said, that *volunti non fit injuria*, yet it is the duty of a Court of Equity to guard against improvidence and undue influence, which, in

the case of reversionary interests of married women, is greatly to be apprehended.

III. Whenever the wife, as defendant, would be entitled to an equity for a settlement, out of her equitable interest, against her husband or against his assignees, she may assert it in a suit, as plaintiff, by bringing a bill in the name of her next friend. (§ 1414.) And although Courts of Equity do not claim any general jurisdiction to decree a suitable maintenance for the wife, out of her husband's property, when he has deserted or ill-treated her, yet, whenever the wife has any equitable property within the reach of the jurisdiction of Courts of Equity, and the husband has deserted or ill-treated or refused to maintain her, they will decree a suitable and immediate maintenance out of the equitable property; or, if it has passed into the possession of a *bonâ fide* purchaser without notice, out of other property of the husband; because the obligation of maintaining the wife is the ground on which the Law gives her property to the husband, and the obligation will fasten itself on her equitable property in the nature of a lien or trust. (§ 1424, 1426, 1408, note.)

III. Equity of the wife, when plaintiff, to a settlement, on her husband's death, bankruptcy, or insolvency,

and to a maintenance in case of the husband's misconduct.

IV. Wife's equity waived,

IV. At any time before a settlement under the decree is completed, or at least before proposals are made under the decree, the Court will not insist on a settlement on the wife, if the wife, by her consent given in open Court or under a commission, agrees that the absolute fund shall be wholly and absolutely paid over to her husband, except in the case of a female ward of the Court of Chancery who has married without its authority. (§ 1418.)

or lost, or suspended.

The equity of the wife to a settlement may be lost or suspended by her own misconduct. Thus, if the wife (not being a ward of Court, married without its consent) should be living in adultery, apart from the husband, a Court of Equity will not direct a settlement, on her own application, as it otherwise would; because, by such misconduct, she has rendered herself unworthy of the protection and favour of the Court. (§ 1419.) In the case, however, of a female ward of Court, married without its consent, the Court will insist on a settlement, as a punishment to the husband for contempt of its authority. On the other hand, in such a case, a Court of Equity will not decree such equitable property to be paid over to

the husband, on his application; for when the wife is living apart from him, he is at no charge for her maintenance; and it is only in respect to his duty to maintain her, that the law gives him her fortune. (§ 1419, note.) But we must be careful to distinguish an application which is grounded merely on general principles of equity, and an application grounded on positive vested rights under a settlement, or under a valid contract for a settlement made before marriage. In the latter case, Courts of Equity cannot refuse to protect or support those vested rights, on account of any misconduct in the wife. (§ 1420.)

Waiver of provision for the children.

We have seen that the Court, in making a settlement on the wife, properly attends to the interests of the children. But it must be observed, that the Court attends to their interest only upon the supposition, that in so doing, it is carrying into effect her own desire to provide for her offspring. They have no independent equity of their own; for although the husband is under a moral obligation to provide for them, yet he is not bound to provide for them in any particular way or out of any particular

fund. They have only a claim to the consideration of the Court constituting part of the equity of their mother, and capable of being either expressly given up by her, or tacitly waived by her dying without having asserted it. The right of the children to the benefit of a settlement attaches, however, on the wife's filing a bill for the purpose; and if she should die pending the proceedings, without waiving the right to a settlement, the children may enforce their claim by a supplemental bill. (See § 1417.)

Section V.

Some Points respecting Deeds of Separation.

As a deed of separation cannot dissolve the marriage, it does not relieve the wife from any of the ordinary disabilities of coverture. (§ 1428.)

A deed of separation entered into between the husband and wife alone, without the intervention of trustees, is utterly void. (§ 1428.)

A covenant for separation, whether immediate or future, or for precluding the parties from any future suit for the restora-

tion of conjugal rights, is utterly void. But it would seem that if a deed for immediate, and not for future separation, contains a covenant by the husband to maintain his wife, and a covenant by the trustees to exonerate him from any debts contracted for her maintenance, such covenant will be enforced so long as the separation lasts; but it will not be enforced for a longer period, even as to past separation. (§ 1428.)

TITLE VI.

OF AUXILIARY EQUITY.

CHAPTER I.

OF A DISCOVERY IN AID OF A SUIT OR DEFENCE IN ANOTHER COURT.

Definition of a bill of discovery.

Every bill may properly be deemed a bill of discovery. But that which in Equity is emphatically called a bill of discovery, is a bill which asks for no relief, but simply seeks a discovery of facts resting in the knowledge of the defendant, or of deeds or writings or other things in the possession or power of the defendant, in order to maintain the right or title of the party asking it, in some suit or proceeding in another Court. (§ 1483.)

Cases where the necessity for a discovery forms the sole ground of jurisdiction.

The necessity for a discovery furnishes a ground of jurisdiction in a great variety of cases. And if the necessity of a discovery forms the sole ground for calling for the interference of a Court of Equity, and no discovery is obtained, the bill must be dismissed, and the relief denied, although there might be other evidence sufficient to establish a title to relief. (§ 691.)

Discovery in

It is immaterial whether the Court be

aid of a foreign suit, or a suit not yet commenced.

situate in the same country, or in a foreign country in amity with the country where the bill is filed. (§ 1495.) And it is not necessary that the suit should be already commenced, to which the bill of discovery is to be auxiliary, if the discovery is indispensable, in order to enable the party rightly to frame his action and declaration. (§ 1483, 1495.)

Bills of discovery are favoured,

As the object of the jurisdiction, in cases of bills of discovery, is to assist and promote the administration of public justice in other Courts, they are greatly favoured in Equity. (§ 1488.)

but may be resisted on certain grounds.

These bills, however, may be resisted on the following grounds: 1. That the subject is not cognizable in any municipal Court. 2. That the Court will not lend its aid to obtain a discovery for the particular Court for which it is wanted. 3. That the plaintiff is not entitled to the discovery, by reason of some personal disability. 4. That the plaintiff has no title to the character in which he sues. 5. That the value of the thing sued for is beneath the dignity of the Court. 6. That the plaintiff has no interest in the subject-matter or title to the discovery required (§ 1489); as where the

plaintiff is only heir apparent. (§ 1490.) 7. That the defendant is not answerable to the plaintiff, but that some other person has a right to call for the discovery. 8. That the policy of the Law exempts the defendant from the discovery (§ 1489): as if a bill of discovery is filed against a married woman, to compel her to disclose facts which may charge her husband; or where the bill seeks to compel a counsel or solicitor to disclose the secrets of his client. (§ 1496.) 9. That the defendant is not bound to discover his own title (§ 1489); a person being only entitled to a discovery of facts and documents necessary to support his own title or that under which he claims, and not to pry into the title of the adverse party. (§ 1490.) 10. That the discovery is not material in the suit. (§ 1489.) 11. That the defendant has no interest in the suit, (§ 1499,) but is a mere witness (§ 1489); unless the bill charges him with fraud; as in the case of an attorney who has assisted a client in obtaining a fraudulent deed (§ 1500); and unless he is the officer of a corporation; in which case he may be made a party to a bill for discovery against such corporation, on the ground, it has been said, that a cor-

poration being an artificial person, cannot be compelled to make any discovery on oath. (§ 1501.) 12. A discovery may in general be resisted where it would disclose circumstances that it would subject the defendant to a penalty or a forfeiture, or to a criminal prosecution, or to ecclesiastical censures. To this rule, however, there are various exceptions; as in the case of fraud or conspiracy, or of a statutory prohibition of resisting a discovery, or an express or implied contract not to resist discovery. (See § 1494, and note, and Story's Eq. Plead. c. xi., and 2 Dan. C. P. 46—55.) 13. A discovery may also be resisted on the ground that it is perfectly clear that the action or defence is not maintainable at Law. (§ 1493 a.) 14. That the Court where the suit is brought has the power of eliciting the facts without the aid of a bill of discovery (§ 1495); and Courts of Law have this power, when the facts depend on the testimony of witnesses, because Courts of Law can compel the attendance of witnesses. (§ 1495, note.) 15. That the discovery is in aid of a controversy pending before arbitrators, who, not being the regular tribunals for administering justice, but judges

of the party's own choice, must submit to the inconvenience incident to their position. (§ 1495.) 16. That the defendant is a *bonâ fide* purchaser for valuable consideration, and without notice, who has paid his purchase money, and has an equal equity with the plaintiff (§ 1502, 1503); or that the defendant is a sub-purchaser, whether with or without notice from such *bonâ fide* purchaser without notice. (§ 1503 a.) 17. That a jointress is entitled to protect herself against a disclosure of her jointure-deed, if the party seeking the discovery is not capable of confirming the jointure, or if, being capable, he does not offer to confirm it. If he is capable, and offers to confirm it, the discovery will be granted as soon as the confirmation is made, but not before; for otherwise it might happen, that after the discovery, his offer might become ineffectual by the intervention of other interests. (§ 1054.)

CHAPTER II.

OF THE TAKING AND PRESERVING OF TESTIMONY IN AID OF A SUIT OR DEFENCE IN ANOTHER COURT.

Definition of a bill to perpetuate testimony.

ONE species of bill filed for this purpose is a bill to perpetuate testimony, which is a bill filed to preserve and perpetuate testimony respecting a vested interest in the plaintiff, which is not liable to be barred by the person against whom the testimony is intended to be used, but is likely to be disputed, and is not capable of being made by the plaintiff the subject of immediate judicial investigation.

Illustrations.

(See § 1508, 1511.) Thus, when the plaintiff's title is in remainder, or when he himself is in actual possession of the property, or when he is in present possession of the rights which he seeks to perpetuate by proofs, he is necessarily unable to bring his disputed interest into immediate judicial investigation; and therefore Courts of Equity will entertain a suit to secure the proofs on which his title depends; for otherwise such proofs might be lost by the death of his witnesses,

and the adverse party might purposely delay his suit with a view to that very event. (§ 1508.)

Definition of a bill to take testimony *de bene esse*.

Another kind of bill of a similar character, but founded on distinct circumstances, is a bill to take testimony *de bene esse*, which is one that is filed to preserve testimony respecting a vested interest in the plaintiff, which is the subject of an action already commenced, and which depends on the testimony of a single witness, or on the sole testimony of aged or infirm persons, or on testimony that cannot be given *vivâ voce* in the ordinary way. Thus, a commission will be granted to take the testimony of persons who are seventy years old, or of persons who are unable to travel, or of those who are going abroad and likely to die before the time of the trial. And the Court will even entertain a bill to preserve the testimony of a witness who is capable of attending, if he is a single witness to an important fact in the cause. (§ 1513, 1514.)

Illustrations.

When a bill to take and preserve testimony will not be entertained.

Where a person is able to bring a matter into immediate judicial investigation, and yet he has not commenced any suit, the Court will not entertain a bill of any kind to take and preserve testimony in his favour. For if, in

such case, the evidence may be procured *vivâ voce* in the ordinary way, there is no need whatever of having recourse to written depositions in place of *vivâ voce* evidence. (§ 1508.) And even if the evidence cannot be procured in the ordinary way, yet a bill to take the testimony *de bene esse* will not be entertained except in aid of a suit already commenced; because if it were, the plaintiff in the bill having obtained the written testimony of his own witnesses, might delay his action until their death, so that they might be guilty of the grossest perjury, and yet go unpunished, and also until the death of those witnesses for the adverse party who were able to give their testimony in the usual way, and thus the justice of the case might be entirely defeated. (§ 1508 and note, and § 1513, note.)

When depositions taken on such bills are not allowed to be used.

Even where a commission is granted to take the written depositions of witnesses, on a bill to perpetuate testimony, or to take testimony *de bene esse*, they will not be allowed to be used, if the witnesses are alive, and capable of attending, and within the jurisdiction, at the time of the trial. (§ 1508, note, and § 1512, 1513, note, and § 1516, note.)

THE END.

INDEX.

A.

ABATEMENT
of debts and legacies, 169.

ACCIDENT:
definition of, 33.
rules as to, 33-40, 145.

ACCOUNT IN GENERAL, 161-2.
open accounts, 162.
stated accounts, 162.
settled accounts, 163.
running accounts, 164.

ADEMPTION:
of portions under a settlement, 220.
of legacies to a child, 221.
to a creditor, 224.
to a debtor, 225.

ADMINISTRATION:
jurisdiction as to, 166.
bill by executor or administrator, 166.
by a single creditor, 167.
by one or more creditors, on behalf of themselves and others, 167.
division of assets, 168.
definition of legal assets, 168.
definition of equitable assets, 168.
of legal assets, 168.
of equitable assets, 169.
order of administration of different properties, 169.
order of satisfaction, 172.
marshalling of assets, 173-7.
foreign assets, 177-8.

ADVANCEMENT, 114.

AGENCY, 207.

AGENT:
fraud of an, 65.

APPORTIONMENT. See MARGINAL ANALYSIS, 190-6.

APPRENTICE-FEE:
apportionment of, 190.

ASSETS. See ADMINISTRATION.

ASSIGNEES:
frauds of the assignees of a bankrupt or insolvent, 66.
equity of the wife against her husband's assignees, 290-5.

ASSIGNMENT:
what amounts to an, 153.
against public policy, 148.
of pay, 148.
of pretended titles, 149.
of mere naked rights to litigate, 150.
of possibilities, or things in action, 152.
important to give notice of, 153.

ATTORNEY:
frauds of an, 65-6.

AUCTIONS:
frauds on, 72.

AWARDS:
frauds in regard to, 56.

B.

BONDS:
lost, 38.
post-obit, 69.
delivery up of, 239.

BOUNDARIES:
settlement of, 230-1.

C.

CANCELLING, 235.

CHAMPERTY, 63, 149.

CHARITIES:
jurisdiction as to, 104.
general rules as to definiteness of the objects, 105.
favoured, in regard to the want of proper trustees, 107;
in regard to defects, 107;
in regard to the objects, 108;
in regard to increase of revenue, 108;
in regard to lapse of time, 109.
abroad, 109.
reward to informers as to, 109.

CHATTELS:
delivery of, 263.

CHILDREN:
removal of children from their parents, 268.
waiver of provision for, 297.

COMMON:
bill to establish a right of, 245.

COMPENSATION. See MARGINAL ANALYSIS, 209-13.

CONCEALMENT, 51.

CONSIDERATION:
agreement not generally enforced, in the absence of a valuable consideration, 146.

[See FRAUD.]

CONSIGNMENT:
revocableness of, 99.

CONTRIBUTION, 190-6.

CONVERSION:
wrongful conversion of property, 123, 269.

CONVEYANCE:
without consideration, and without use or trust, 111.
in another's name, 113.

COPIES:
of deeds, 238.
COPYRIGHT:
injunctions to restrain infringements of, 256.
COVENANT:
to purchase lands, 116.
to settle lands, 116.
to convey, transfer, or pay money or other property, 118.
must be fulfilled, notwithstanding accident, 34.
where relief is granted as to a breach of, 212.
CREDITORS:
assignments for benefit of, 98.
frauds on creditors, parties to a composition deed, 75.
payment of legatees or distributees before, 118.
election in the case of, 218.
legacies to, 224.
by, 225.
[See DEBTOR.]
CRIMINAL PROCEEDINGS:
suppression of, 62.

D.

DAMAGES, 209-13.
DEBTOR:
frauds in the case of persons standing in the confidential relations of debtor, creditor, and surety, 66.
legacy by, 224.
to, 225.
[See CREDITOR.]
DEBTS:
devise in trust to pay, 113.
devise charged with, or subject to, 113.
DEEDS:
destroyed, lost, or suppressed, 36-7.
cancelling, delivering up, and securing, 235-9.
DELIVERING UP:
of documents, 235-9.

DISCOVERY, 303-7.

DOCTOR:

fraud of a, 65.

DONATIONES MORTIS CAUSA, 88-9.

DOWER:

assignment of, 231.

E.

ELECTION, 214-19.

EQUITY:

is a suppletory system, 9.
disadvantages of the equity procedure, 10.
merits of the equity procedure, 11.
ground of the division of law and equity, 14.
amalgamation of law and equity, 15.

EQUITY JURISDICTION:

where equity has exclusive jurisdiction, 6.
where equity has concurrent jurisdiction, 6.
on account of the inadequacy of the legal relief, 7;
or to avoid circuity of action, or multiplicity of suits, 7;
or to take due care of the rights of all, 7;
or on account of the original denial of due relief at law, 8;
or the doubtfulness of obtaining such relief, 8.
where equity has auxiliary jurisdiction, 8.
where it has no jurisdiction, 9.
propriety of equity jurisdiction being confined within its present limits, 9-11.
propriety of equity possessing its present jurisdiction, 11-14.

EQUITY JURISPRUDENCE:

definition of, 2.
true character of, 9, 14.
division of, 29.
remedial equity, 31-79.
executive equity, 81-158.
adjustive equity, 159-232.
protective equity, irrespective of disability, 233-263.

EQUITY JURISPRUDENCE: (*continued.*)
protective equity, in favour of persons under disability, 265-299,
auxiliary equity, 301-310.
[See NATURAL JUSTICE.]

EXECUTOR:
fraud of an executor or administrator, 66.
fraudulent dealing with executors or administrators, 78.
sales or pledges by, 138.
as to other points, see MARGINAL ANALYSIS, 125-40.

F.

FALSIFY:
liberty to surcharge and falsify, 163.

FINE:
bill to settle the fine payable by copyholders, 245.

FORFEITURES. See MARGINAL ANALYSIS, 210-13.

FRAUD IN GENERAL:
unsafe to define fraud in general, or the extent of remedial equity on the ground of fraud, 47.

FRAUD, ACTUAL:
definition thereof, 47.
jurisdiction in cases of, 47, 48.
evidence thereof, 50.
division of, 50.
first class of, 50.
1. Misrepresentation, 51.
2. Concealment, 51.
3. Inadequacy, 54.
4. Refusal to consent to a marriage, 55.
5. Awards, 56.
second class of, 56.
1. On persons of unsound mind, 56.
2. On intoxicated persons, 57.
3. On persons of weak understanding, 58.
4. On persons who are not free agents, but under duress, or in fear, or imprisonment, or extreme necessity, 58, 59.
5. On infants, 59.

FRAUD, CONSTRUCTIVE:
definition of, 60.
four classes of, 60.
frauds on public policy, 60.
1. Marriage brokage contracts, 60.
2. Agreements to influence testators, 61.
3. Contracts to facilitate marriages, 61.
4. Contracts or conditions in restraint of marriage, 61.
5. Contracts or conditions in restraint of trade, 62.
6. Contracts for public offices, 62.
7. Suppression of criminal proceedings, 62.
8. Champerty and corrupt considerations, 63.
frauds in the case of persons in the confidential relations of—
1. Parent, 63.
2. Guardian, 64.
3. Quasi guardian or adviser, 64.
4. Attorney, 65.
5. Doctor, 65.
6. Agent, 65.
7. Trustee, 65.
8. Assignees and solicitors of bankrupt or insolvent, 66.
9. Executor or administrator, 66.
10. Debtor, creditor, and surety, 66.
frauds in the case of persons peculiarly liable to be imposed on, 67.
1. Bargains with expectant heirs, 67; and remaindermen and reversioners, 68.
2. Post-obit bonds, &c. by expectants, 69.
3. Sales to expectants at exorbitant prices, 69.
4. Common sailors, 69.
virtual frauds on individuals, irrespective of any confidential relation, or any peculiar liability to imposition, 70.
1. Misleading, 71.
2. Frauds on auctions, 72.
3. Unconscientious use of the Statute of Frauds. 72.
4. Clandestine marriage contracts, 73.
5. Frauds on marriages, 73.
6. Frauds on marital rights or expectations, 74.
7. Frauds under the stat. 13 Eliz. c. 5, 74.

FRAUD, CONSTRUCTIVE: (*continued.*)
8. Frauds on creditors, parties to a composition deed, 75.
9. Mortgage or conveyance, with notice of another's title, 76.
10. Fraudulent dealing with executors or administrators, 78.
11. Frauds under the stat. 27 Eliz. c. 4, 79.

G.

GENERAL AVERAGE, 195.

GUARDIANS:
fraud of, 64.
as to other points, see MARGINAL ANALYSIS, 267-74.

H.

HEIRS:
bargains with expectant, 67.
post-obit bonds by, 69.
sales to expectant heirs at exorbitant prices, 69.

HUSBAND. See MARRIED WOMEN.

I.

INADEQUACY, 54.

INCUMBRANCES:
apportionment of, 191.
voluntary discharge of, 191-2.
compulsory discharge of, 192.
keeping down interest on, 193.
[See MORTGAGES.]

INFANTS:
frauds on, 59.
agreements by, 146.
as to other points, see MARGINAL ANALYSIS, 267-74.

INJUNCTIONS:
to restrain proceedings at law, see MARGINAL ANALYSIS, 248-251, 290.
for other causes, see *ib.* 252-9.

INSPECTION:
of deeds, 238.

INTERPLEADER. See MARGINAL ANALYSIS, 240-3.

INTOXICATED PERSONS:
frauds on, 57.

J.

JOINT PURCHASE OR MORTGAGE:
doctrine of equity in regard to, 25.
implied trust on, 115.

JURISDICTION:
interposition of equity in regard to property out of the jurisdiction, 28.

L.

LACHES:
consequences of, 24.

LEGACIES:
jurisdiction as to, 83.
to married women, 85.
to infants, 85.
payable at a future day, 85,
specific legacy to one for life, remainder to another, 86.
construction of, 86.

LETTERS:
injunctions to restrain the publication of, 258.

LIMITATIONS, STATUTE OF:
how far equity followed the law as to, 23.

LUNATICS AND OTHER PERSONS OF UNSOUND MIND:
frauds on, 56-8.
as to other points, see MARGINAL ANALYSIS, 275-77.

M.

MAINTENANCE AND CHAMPERTY, 149.

MAINTENANCE:
apportionment of, 190.
for a ward of court, 271.

MARRIAGE:
brokage contracts, 60.
contracts to facilitate, 61.
contracts or conditions in restraint of, 61.
clandestine marriage contracts, 73.
frauds on, 73.
frauds on marital rights and expectations, 74.
refusal to consent to a, 55.
articles, execution of, 97.

MARRIED WOMEN:
legacies to, 85.
common law doctrine as to, 278.
powers which husband and wife have in equity of contracting with and giving to each other, 278-9.
pin-money, 280.
paraphernalia, 281.
separate estate, 282-8.
wife's equity to a settlement or maintenance out of her own property, 289.
when defendant, against her husband, 289-90.
against his assignees or vendees, 290-4.
when plaintiff, 295.
waived, lost, or suspended, 296-7.
deeds of separation, 298-9.
agreements by them not enforced, 146.

MARSHALLING:
of assets, 173-7.
of securities, 202.

MAXIMS, GENERAL. See MARGINAL ANALYSIS, 16-28.

MESNE PROFITS, 207.

MISDESCRIPTION:
slight, 145.
substantial, 145.

MISLEADING, 71.

MISREPRESENTATION, 51.

MISTAKE. See MARGINAL ANALYSIS, 41-6.

MORTGAGES OF REAL PROPERTY:
what amounts to a mortgage, 179.
mortgagee's estate and rights, and liability to reconvey and account, 180-1.
mortgagor's estate and rights, 180.
tacking, 181.
who may redeem, 184.
foreclosure, 184.
sale, 184.

MORTGAGES OF PERSONAL PROPERTY:
distinguished from pledges, 187.
tacking, 187.
mortgagor's right to redeem, and mortgagee's right to sell, 188.

N.

NATURAL JUSTICE:
equity is not synonymous with, 3.
large portion of it left to conscience, 5.
another large portion is administered in courts of law, 5.
equity is only a portion of natural justice in a modified form, 5.
[See EQUITY.]

NE EXEAT REGNO:
writ of, 260.

NOTES, LOST, 38.

NUISANCES:
injunctions to restrain, 255.

O.

OFFICES:
contracts for, 62.

P.

PARENT:
frauds of a, 63.
removal of children from, 268.

PAROL CONTRACTS:
where enforced, 154.
PAROL VARIATIONS OR ADDITIONS, 156.
PAROL PROMISE:
where enforced, 157.
PARTITION. See MARGINAL ANALYSIS, 227-30.
PARTNERSHIP. See MARGINAL ANALYSIS, 197-201.
PATENTS:
injunctions to restrain infringements of, 255.
PEACE:
bills of, see MARGINAL ANALYSIS, 244-46.
PENALTIES. See MARGINAL ANALYSIS, 210-13.
PLEDGES:
distinguished from mortgages of personal property, 187.
pledgor's right of redemption, 188.
pledgee's right of sale, 189.
POWERS:
relief in cases of the defective execution or non-execution of, 39.
PRIMOGENITURE:
equity follows the law as to, 21.
PURCHASER:
his obligation to see to the application of the purchase money, see MARGINAL ANALYSIS, 99-103.

R.

RECEIVER, 262-3.
RESIDUE:
implied trust of, 112.
REMAINDER-MEN:
bargains with, 68.
REMITTANCE:
revocableness of, 99.

RENTS:
where a suit will be entertained for the recovery of, 17.
REVERSIONERS:
bargains with, 68.

S.

SAILORS:
frauds on, 69.
SATISFACTION. See MARGINAL ANALYSIS, 220-26.
SECURING:
of documents, 238.
SET-OFF, 205-6.
SPECIFIC PERFORMANCE. See MARGINAL ANALYSIS, 141-58.
STOCK:
reduction of, 33.
SURCHARGE AND FALSIFY:
liberty to, 163.
SURETIES:
contribution between, 194.
mutual right to benefit of securities between a creditor and sureties, 203.
SUPPLICAVIT:
Writ of, 261.

T.

TERMS OF YEARS:
trusts of, 94.
TESTATORS:
agreements to influence, 61.
TESTIMONY:
bill to perpetuate, 308-10.
bill to take testimony *de bene esse*, 309.
TITHES AND MODUSES, 208.
TRADE:
contracts or conditions in restraint of, 62.

TRUSTS IN GENERAL:
definition of, 90.
extent of jurisdiction over, 90.
division of, 90.

TRUSTS, EXPRESS PRIVATE:
executed, 20, 93.
executory, 20, 93.
as to other points, see MARGINAL ANALYSIS, 90-103.

TRUSTS, IMPLIED. See MARGINAL ANALYSIS, 111-16.

TRUSTS, CONSTRUCTIVE. See MARGINAL ANALYSIS, 117-24.

TRUSTEES. See MARGINAL ANALYSIS, 125-140, 65.

U.

USURIOUS TRANSACTIONS, 27.

V.

VENDOR'S LIEN:
nature of and reasons for, 119.
where it originally exists, 119.
continuance thereof, 120.
against whom it exists, 120.

W.

WARDS. See MARGINAL ANALYSIS,* 267-74.

WASTE:
injunctions to restrain, 253-4.
account in cases of, 208.

WILL:
defective execution of a will not remedied, 35.
bills to establish wills, 246, 247.

* In many instances, it seemed as convenient to the reader to refer to the Marginal Analysis, as to have the points embodied in the Index, which, in that case, must have been double its present length.

William Stevens, Printer, Bell Yard, Temple Bar.

377337

Law
Eng
S655ma.3

Smith, Josiah William
A manual of equity jurisprudence.

A

University of Toronto
Library

DO NOT
REMOVE
THE
CARD
FROM
THIS
POCKET

Acme Library Card Pocket
LOWE-MARTIN CO. LIMITED

A

MANUAL

OF

EQUITY JURISPRUDENCE

AS

Administered in England,

FOUNDED ON THE

COMMENTARIES OF JOSEPH STORY, L

ONE OF THE JUSTICES OF THE SUPREME COURT OF T
UNITED STATES,

AND COMPRISING, IN A SMALL COMPASS,

A NUMEROUS COLLECTION OF PO

CONSTANTLY OCCURRING

IN

Chancery and Conveyancing,

AND IN

THE GENERAL PRACTICE OF A SOLICI

BY JOSIAH W. SMITH, B.C.L.

OF LINCOLN'S INN, BARRISTER AT LAW

Editor of Fearne's Contingent Remainders and Executory Devises, and Auth
Lectures on Int

LONDON:

V. AND R. STEVENS, AND G. S. NORT

Law Booksellers and Publishers

successors to the late J. & W. T. CLARKE, of Portugal

AND 39, BELL YARD, LINCOLN'S IN

HODGES AND SMITH, DUBLIN.

MDCCCXLV.

Price Eight Shillings and